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MR. R. NARAYANASWAMI IYER, B.A., B.L.,
Advocate, High Court, Mylapore, Madras.

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JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1930.

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PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE AND SIR CHARLES SARGANT.

M. M. Ispahani .. *Appellant**

v.

Societa Veneziana di Navigazione a Vapore .. *Respondents.*

P. C.

Ispahani *v.* Societa Veneziana di Navigazione a Vapore.

Contract—Rescission by mutual consent—Evidence.

In an action for damages for breach of contract brought by the respondents, shipowners, against the appellant, a shipper, the latter admitted the contract and the non-performance of it, and pleaded that the contract had before breach been duly rescinded by mutual consent. All the evidence upon the vital issue of rescission had before the hearing been taken on commission, and the Trial Judge had, therefore, not had the advantage of seeing the witness in the box. The Trial Judge held that the appellant had made good his plea of rescission and dismissed the suit with costs. On appeal, the Appellate Bench of the High Court, however, held that the appellant had failed to establish his case of rescission, and decreed the suit.

On further appeal to the Privy Council, *held* that the judgment of the Appellate Court expressed on the evidence was the only conclusion judicially permissible.

Appeal No. 4 of 1929 from a decree of the High Court, Calcutta, Appellate Side (Rankin, C.J. and C.C. Ghose, J.), dated 20th January, 1928, reversing the judgment of Buckland, J., sitting on the Original Side, dated the 28th June, 1927.

The material facts of the case are stated sufficiently fully in their Lordships' judgment.

H. du Parcq, K.C. and *Hyam* for appellant.

Leslie Scott, K.C. and *Robert Aske* for respondents.

*P. C. Appeal No. 4 of 1929. 4th March, 1930.

P. C.

Ispahani *v.* Societa Veneziana di Navigazione a Vapore.

Lord Blanesburgh.

4th March, 1930. Their Lordships' judgment was delivered by

LORD BLANESBURGH.—This was an action for damages for breach of a contract made on 2nd February, 1925, to ship 2,000 tons of rice from Rangoon to Mediterranean and Black Sea Ports by any of the respondents' steamers in March or April, 1925, at steamer's option. The action was brought by the respondents, the shipowners, against the appellant, the shipper, in the High Court of Calcutta in its original jurisdiction. The contract was admitted, and performance of it was not set up.

The appellant's answer to the claim against him was that the contract had before breach been duly rescinded by mutual consent. Separately, if the contract did remain in force, the amount claimed was excessive. The respondents had not minimised their damage, as it was their duty to do. These two issues, raised by the appellant, were substantially the issues at the trial.

All the evidence on both sides had before the hearing been taken on commission and for the most part at Rangoon. This was probably inevitable. The action depended at Calcutta. But it was at Rangoon that the transactions in question had all been carried out between the representatives there of the respondents and the appellant, and these representatives on both sides were still resident at that place.

The result of the procedure adopted has, however, been an embarrassment to every tribunal subsequently called upon to deal with the case. Upon the vital issue of rescission there is an acute conflict of testimony between witnesses not shown to be unworthy of credit. It might accordingly have been of the greatest help to the Trial Judge in determining where the real truth lay to see all these witnesses in the box. With their evidence taken on commission, he remained as dependent as was the High Court upon the printed record alone. All Courts again have suffered from the fact that taken on commission none of the evidence was adduced under the personal direction of the learned Judge who had to decide the dispute. It does not seem to be doubtful that in the present case if Mr. Justice Buckland's presiding influence had been available while the evidence was being taken questions which have ceased to be, if they ever were, important would not have become preponderant, while the testimony upon the vital issue in acute controversy would have

been made more complete than in many important aspects and on both sides it is left.

Upon this incomplete printed material to which both Courts were so relegated, divergent conclusions have been reached. Mr. Justice Buckland was, upon the evidence, of opinion that the appellant had made good his plea of rescission, and by a decree of the 28th June, 1927, he dismissed the respondents' action with costs. On appeal by them to the Appeal Court, the learned Judges there came to the conclusion that the appellant had failed to establish his case of rescission and on the 24th January, 1928, that Court allowed the respondents' appeal, decreed the suit, and directed an inquiry to ascertain the damages sustained by the respondents through the appellant's breach of contract.

Hence the present appeal. The defendant-appellant seeks to have the decree of dismissal restored. He is content, however, if the judgment of the Appeal Court is in other respects to stand, that the inquiry as to damages shall go as directed by its decree. The Board accordingly is concerned only to determine whether the appellant has or has not established in evidence his plea of rescission.

In this task their Lordships have been greatly assisted by the elaborate and most carefully-expressed opinions of Mr. Justice Buckland at the trial, and of the learned Chief Justice, who, on appeal, delivered the judgment of the Appeal Court. A perusal of the two judgments discloses quite clearly the stages at which they diverge, and their Lordships thereby dispensed from again going over all the ground which with such care has been judicially explored in both Courts, are in the result enabled, more compendiously to expose their reasons for the conclusion which, in the result, they have themselves reached.

The appellant is a merchant of Calcutta, with a branch business at Rangoon. He is represented there by Mr. Sadeq Ispahani, who was alone concerned on the appellant's side in the transactions now in question. It will be convenient to refer to him as Mr. Sadeq.

The respondents, plaintiffs in the action, are a company owning a line of steamships trading with the East. Their headquarters are at Venice. They are represented at Rangoon by Messrs. Gillanders, Arbuthnot & Co., a well-known firm of Indian merchants, with a branch there, of which Mr. Arthur Ellison Forster was manager at the time.

Amongst Gillanders' agencies at Rangoon two only enter into the story—their agency for the respondents, and their

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agency for the Lloyd Triestino Steam Navigation Company, as owners of the S.S. *Numidia.*

The appellant is an extensive shipper from Rangoon, and Mr. Sadeq was, it appears, in frequent association with Gillanders as representing shipping companies whose vessels trade with that port. In October, 1924, he had engaged with them, acting on behalf of the Triestino Company, for the carriage, by a January-February, 1925, shipment, of 1,000 tons of rice from Rangoon to Mediterranean ports. That time limit fixed for shipment was important to the appellant. He was under contract with buyers of the rice at the ports of destination upon terms which could not be fulfilled by any later shipment. The *Numidia* of the Triestino Line, timed to arrive at Rangoon in February, was in due course appropriated to the contract, and it was in these circumstances that, on the 28th January, 1925, Mr. Sadeq was informed by Mr. Vertannes, a representative of Gillanders, that according to advices just received the *Numidia* was delayed in her voyage and could not reach Rangoon in February. It is now common ground—and the fact becomes of real importance in the sequel—that this information was first given to Mr. Sadeq on the day named, and not later. His earlier recollection, as reflected in the appellant's original written statement, apparently was that the information reached him after the contract now being sued on had been made, and not before. This, however, was not so. It results from his admission—it may be more correctly described as his assertion in evidence—that he had been so informed five days before he made the contract at all. It is in the light of that fact, amongst others, that the question in suit has to be determined: whether four days later the contract entered into by Mr. Sadeq in that knowledge was in turn rescinded at his instance in the circumstances he states.

Mr. Sadeq's account and explanation of the rescission may be summarized as follows. On the 2nd February when he engaged space for the 2,000 tons of rice by the respondents' firm, he had no actual buyers of the cargo in prospect. As prospective buyers he was looking to those who had already taken up the cargo to be shipped on the *Numidia.* By the 6th February, however, he realised that owing to the late arrival of that vessel he would be in such difficulties with these buyers that he could not hope, so soon afterwards, to make any further sales to them, and it might be difficult to obtain other buyers. He became

therefore desirous of being relieved of the contract of the 2nd February. He had something to offer in return, because Gillanders, in his view, were liable to the appellant in substantial damages in respect of the *Numidia's* late arrival. Mr. Sadeq's proposal on the 6th February, made by him, as he says, to Mr. Forster, accordingly was that in consideration of the appellant renouncing all claims for damages in respect of the late arrival of the *Numidia,* Gillanders on behalf of the respondents would cancel the appellant's contract of the 2nd February. And Mr. Forster, so Mr. Sadeq says, agreed on the respondents' behalf, to this proposal. No one else was present, and Mr. Forster denies that he made or could have made any such agreement.

Now, it must, their Lordships think, be conceded, that if that were all, Mr. Sadeq's story, disputed as it is, does not carry conviction. He does not explain with any effect why it was that the late arrival of the *Numidia,* which did not stop him from engaging this tonnage on the 2nd February, should only four days later have impelled him, if he could, to relinquish it. And there is evidence as to the market scarcity of freight at both dates sufficient to lead him both to obtain and to retain the tonnage as an ordinary business transaction. And Mr. Sadeq produces no protest from any of his buyers of date earlier than the 9th February. He does, it is true, suggest almost casually, that his information as to the late arrival of the *Numidia* was more definite by the 6th than it had been on the 2nd February. But that is a very different thing from having had no information at all on the 2nd, and, moreover, no support in any direction is forthcoming for the suggestion that Mr. Vertannes's intimation of the 28th January was not completely specific or that it needed or obtained any later confirmation. But these are only preliminary difficulties in Mr. Sadeq's way. There are others. He does not suggest that as between the appellant and the respondents he had any ground upon which he could ask for a gratuitous cancellation of his contract. He recognised, if his request was to be acceded to, that some consideration to somebody for the cancellation must proceed from the appellant, and while their Lordships are ready to go far in crediting Mr. Sadeq with the belief—however mistaken—that a release of Gillanders from a personal liability would justify them in procuring for him a gratuitous release from the respondents whom they also represented, the proposal, if ever made, must have impressed Mr. Forster very differently. For one thing, it was beyond reason that the late arrival of the *Numidia* could have involved

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Gillanders in any personal liability at all to shippers by her. But, more important far, the suggestion of Mr. Sadeq, if made in the terms and for the inducement deposed to, must at once have struck Mr. Forster as a proposal not to be listened to; one which it would be dishonourable for Gillanders to accept or even to entertain.

Further, if the proposal was made, it is hardly possible that Mr. Forster, so far as appears, an honourable business man, could have forgotten it. Yet he has no recollection of it at all. His recollection of the interview deposed to after a two years' interval was vague. It related, as he recalled it, only to Mr. Sadeq's difficulties in regard to the appellant's *Numidia* shipment, and had nothing to do with his contract with the respondents. And confirmation of this is not wanting in what subsequently happened. According to Mr. Sadeq's statement, as their Lordships understand it, the appellant in consideration of the release was to stand by his contract with the Triestino Company, making, however, no claim in respect of the *Numidia's* late arrival. He was himself to settle with his buyers. What subsequently happened, however, shows that Mr. Sadeq treated that contract as entirely at an end, for ultimately Gillanders secured for the appellant, by the respondents' steamship *San Michele*, which sailed from Rangoon for Mediterranean ports in February, room for 850 tons of the appellant's rice, destined for the *Numidia*.

Mr. Sadeq was quite unable to give any sensible reason why Gillanders, agents of the Triestino Line, were entitled or should have troubled to render him this service through the Venice Line if, as his case was, his contract in relation to the *Numidia* stood but with all liability in respect of her late arrival, so far as concerned the appellant, at an end.

All these considerations make Mr. Sadeq's story unlikely. But his preliminary difficulties are not even yet ended. The transaction was undoubtedly important. Mr. Sadeq so regarded it. Yet no memorandum of it exists. None was made or sent by Gillanders either to their principals, the respondents or to Mr. Sadeq. More remarkable still, no note of it was made or sent by Mr. Sadeq to Gillanders. The contract rescinded had been the subject of a memorandum in writing sent to Mr. Sadeq. Its rescission four days later remains unrecorded anywhere.

These difficulties in the way of the appellant's case are formidable indeed and they were, in their Lordships' judgment, unduly discounted by the learned Trial Judge. But even so,

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it seems clear, that if there had been nothing more to be considered he, too, would have held that the appellant had failed to establish his plea of rescission. His conclusion that he had proved it really resulted from his finding that, as it happened, although all unknown to Mr. Sadeq, cancellation of the contract of the 2nd February was, on the 6th February, as much to the relief of Gillanders as it could be to the appellant. As a result of inconsistent instructions from the respondents, Gillanders were then embarrassed as to the March-April tonnage, and he finds corroboration of his resulting view that rescission had really been agreed to in the fact which he holds proved that Gillanders within a few days were offering the surrendered tonnage to another shipper. Above all he is unfavourably impressed by the respondents' failure to call as a witness Mr. Stewart, the one member of Gillanders' staff to whom all the facts were known at first hand, and who could have resolved one way or another the uncertainty in which the whole matter is left by the incomplete evidence on both sides.

The real difference between the Appeal Court and the learned Judge is to be found at this stage. The learned Judge did not, in the view of the Appeal Court, correctly appreciate the position. Gillanders' embarrassments were less serious than he supposed. The absence of Mr. Stewart from the witness-box, however regrettable, did not prove the appellant's case. And their Lordships find themselves in general agreement with the Appeal Court. Indeed the action of Gillanders, so far as it is proved, suggests to their minds that no desire to cancel the appellant's contract with the respondents had, on the 6th February, even been expressed by Mr. Sadeq. As to the assertion that the appellant's reserved tonnage was subsequently on offer by Gillanders, while they agree with the learned Judge in their appreciation of its seriousness, they are unable in the circumstances to regard it as proved.

It seems to their Lordships to be established that in early February, 1925, there was a demand generally for March-April tonnage from Rangoon in excess of the expected supply. On 6th February Gillanders had before them a cable from the respondents of the 2nd February in which they expressed a desire to cancel to the extent of 4,000 tons the space for these shipments which Gillanders had been authorised to let. Before receipt of that cable all the authorised space was under offer or had been let. The appellant had taken 2,000 tons of it. In these circumstances it seems to their Lordships that on the 6th Feb-

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ruary, if the request were then made by Mr. Sadeq as he says, Mr. Forster while presumably not in a position to accede to it without further instructions, must at least have informed his principals that 2,000 tons could be freed if they desired that smaller quantity. Gillanders, however, did nothing of the kind. What, in fact, happened was that on the 7th February Mr. Vertannes cabled for authority to let further tonnage.

All this, as it seems to their Lordships, so far from negativing, tends to support the view that Mr. Sadeq's request, if it were ever made, was not appreciated by Mr. Forster and was certainly not granted.

The second circumstance on which the learned Judge relies is more cogent.

There was taken on commission a mass of evidence directed to show that the respondents had not minimised their loss. The point stressed in cross-examination of their witnesses was that they had not accepted from Messrs. Steel Brothers, another Rangoon firm of shippers, an offer to take the vacant tonnage, after they knew in March, 1925, that the appellant was relying on the fact that his contract had been duly rescinded. As his very last witness, the appellant, with a view to proving his case on this point, called a Mr. Matthew, assistant manager of Steel Brothers, knowing nothing, as their Lordships were informed, of what the witness would say. Quite unexpectedly Mr. Matthew deposed that Gillanders in February, 1925, themselves offered Steel Brothers 2,000 tons March-April shipment by the Venice Line at rates which were in fact identical with those to be paid by the appellant and that Steel Brothers, by a counter-offer made as early as the 16th February, 1925, offered *2s. 6d.* per ton less, and that Gillanders did not accept it. With reference to this evidence, Mr. Justice Buckland's finding is very express:

"I regard it as established beyond all question," he says, "that an offer of space was made to Steel Brothers in the terms to which this witness speaks." And the importance of the finding he summarises later as follows:—

"No explanation whatever consistent with the plaintiff company's case is suggested of the offer to Steel Brothers which will exclude it having reference to the 2,000 tons of space booked by the defendant firm."

In other words, this evidence showed that the 2,000 tons could only be free as the result of the rescission deposed to by Mr. Sadeq.

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Their Lordships appreciate the force of the learned Judge's reasoning. At its face value Mr. Matthew's evidence is most important, and its importance is heightened by the conflicting evidence from Gillanders as to the relevant bookings, and by the absence from the witness box of Mr. Stewart, who was the one person to make all these things plain. But their Lordships have to ask themselves, whether this statement of Mr. Matthew's is by itself sufficient to displace on the direct issue not only the sworn evidence of Mr. Forster, but all the other matters to which they have referred, and which together make the appellant's case so difficult of acceptance. In their judgment it is quite insufficient for that purpose, and they cannot but feel that the learned Judge himself would have hesitated to act upon it with the confidence he did if he had been more impressed than he was by those serious preliminary difficulties in the appellant's way, which their Lordships have detailed. And Mr. Matthew's evidence, circumstantial as superficially it appears to be, is by no means completely convincing. It was not directed at all to the issue of rescission, and it is quite clear from their questions to the witness that counsel on neither side realised at the time that it might have a material bearing upon that issue. Accordingly, there was neither examination nor cross-examination as to his means of knowledge nor as to the circumstances of the alleged offer, nor anything in relation to it. Nor can it be assumed, as their Lordships think, that the offer if made as stated necessarily related to the respondents' tonnage. Further, as to the failure of the respondents to call Mr. Stewart, the failure was, their Lordships think, most regrettable. But it has to be noted that not only was the possible bearing of Mr. Matthew's evidence not appreciated when it was given, but he was the appellant's last witness, the respondents' evidence having been concluded some time before. At that stage it seems to have been common ground—or at least the view of the appellant's advisers—that Mr. Stewart's evidence would have been valuable only on the quantum of damages to which question so much of the evidence taken was being directed.

Their Lordships think it unnecessary to canvass the matter further. On the whole case, and even without having heard the learned counsel for the respondents, they are led to the conclusion that the judgment of the Appeal Court expressed on the evidence the only conclusion judicially permissible. They think, with the learned Chief Justice, that the appellant has not shown

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"beyond a reasonable doubt that the contract of the 2nd February was verbally cancelled on the 6th."

Their Lordships accordingly will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellant: *Sanderson Lee & Co.*

Solicitors for respondents: *Botterell & Roche.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR LANCELOT SANDERSON.

Shah Zahid Husain and others .. *Appellants**

v.

Mohammad Ismail, since deceased, and others .. *Respondents.*

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Privy Council—Special leave for appeal to—Grant of, on grounds found to be untenable at hearing of appeal—Objection to competence of appeal taken at hearing on ground of—Procedure on—Petition by respondent for rescission of order granting leave—Necessity.

Where it appeared at the hearing of an appeal for which special leave had been granted that the ground on which such leave was applied for and granted did not in fact exist and that the appeal was therefore incompetent, *held*, that their Lordships were competent to advise His Majesty that, on the facts as disclosed at the hearing, the appeal should not be further entertained.

Held further, that, as the objection to the competence of the appeal was put in the forefront of the respondents' case, a petition by them to have the order in Council giving the special leave rescinded was unnecessary.

Costs of the appeal provided for as per the terms as to costs imposed by the order granting special leave.

Appeal No. 66 of 1927, by special leave, from a decree of the High Court, Allahabad, dated the 22nd February, 1916, reversing the decree, dated the 27th September, 1913, of the Subordinate Judge of Saharanpur, and dismissing the plaintiffs' suit.

For purposes of the present report it is sufficient to set out below the order of the High Court refusing leave to appeal to His Majesty in Council.

The learned Judges (Mears, C.J. and Banerji, J.) said:

"The facts of this case are these. The plaintiffs, who claimed to be zemindars, applied to the Revenue Court for partition of the abadi land lying within the ambit of their zemindari. Certain persons came forward with objections asserting that they were proprietors of the sites of their dwelling-houses and that those sites could not be included in the partition for which the plaintiffs had applied. The Revenue Court referred the plaintiffs to the Civil

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Court and directed them to establish their right in regard to the plots held by the persons who had preferred objections in the Revenue Court. These persons claimed to be the descendants of one Abdullah Shah and were called "Pirzadas". Their allegation was that Bhalol Lodhi, one of the Lodhi Kings, had made a grant of the village to Abdullah Shah, that the descendants of Abdullah Shah were the proprietors of the land, and that these defendants, as such descendants, were proprietors of the sites of their houses. The Court of first instance made a decree in favour of the plaintiffs. The plaintiffs, we may mention, had valued their suit at Rs. 5,100 and they had included in their claim 18 complete plots and portions of two other plots, altogether 20 plots. It was in respect of these 20 plots that the case was fought in the Court below and also in this High Court. From the judgment of the learned Judges of this Court it appears that the dispute raised by the defendants related to the plots which were in the occupation of persons known as "Pirzadas" and not in respect of any other plots in the abadi. This Court reversed the decision of the Court below and dismissed the claim of the plaintiffs against the defendants.

"The plaintiffs have now applied for leave to appeal to His Majesty in Council and it is alleged on their behalf that the decision of this Court indirectly affects property of the value of over Rs. 10,000 and that as this Court reversed the decision of the Court below, they are entitled as of right to appeal to His Majesty in Council. It is stated in their affidavit that there are 527 plots of land in the abadi of which only 20 were in dispute in the present case, and that a decision in the present case would affect the remaining 507 plots, and the value of those plots, if added to the value of the 20 plots in dispute in this suit, would exceed Rs. 10,000. It is denied on behalf of the opposite party that the decision in the present case would affect any plot of land in the abadi which is not in the possession of one of the descendants of Abdullah Shah and who is not known as "Pirzada". This appears to be clear from the judgment of this Court and from the pleadings in this case. It is not shown in the affidavit of the applicants that there are other plots besides the 20 plots in dispute in the present case which are in the occupation of "Pirzadas" and would necessarily be affected by the decision in the present case. It is also not suggested or shown what those plots are and what the value of those plots may be. Therefore the plaintiffs have failed to show that there is any other plot in the abadi which the decision in the present case would directly or indirectly affect. In this view the application of the plaintiffs must fail. No question of general importance is involved in the case as the dispute was limited between the particular plaintiffs and the particular defendants and the class of persons known as "Pirzadas," who are the descendants of Abdullah Shah. The decision cannot affect any other property and

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any other class of tenants and therefore we are not satisfied that this is a case which we should certify to be a fit one for appeal to His Majesty in Council. The application is, therefore, rejected with costs."

By an order in Council, dated the 23rd July, 1923, the plaintiffs were granted special leave to appeal to His Majesty in Council.

De Gruyther, K.C. and *Wallach* for appellants.

Abdul Majid for respondents.

Majid for respondents objects that special leave should not have been granted, as there was no proof that the appeal even indirectly affected property valued at more than Rs. 5,100, which was the value of the suit in the Court of first instance.

Wallach in reply.—Our affidavit shows that there are other plots besides the 20 plots in dispute in the present case which were in the occupation of the Pirzadas and would necessarily be affected by the decision in this case.

[SIR LANCELOT SANDERSON.—The High Court in refusing you leave to appeal distinctly point out that the decision will not affect any other plots except those in suit.]

I submit that if the decision of the High Court stands, other plots in the abadi will be affected.

[LORD BLANESBURGH.—There is no evidence to that effect. Your affidavit does not support it.]

The High Court is in error in stating that there is no question of general importance involved.

[LORD BLANESBURGH.—In your petition to the Board for special leave, you do not base your case on the ground of the question being of general importance, but merely that your title to the other plots would be affected and that consequently the limit of Rs. 10,000 was reached. Leave was not asked for nor granted because of the general importance of the question.]

[LORD RUSSELL.—The facts now disclosed to the Board show that special leave ought not to have been granted.]

[SIR LANCELOT SANDERSON.—It is open to the Board, notwithstanding that special leave was given, to declare that the appeal is not competent.]

[LORD BLANESBURGH.—We can still advise His Majesty that the appeal be not further entertained.]

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13th March, 1930. Their Lordships' judgment was delivered by

LORD BLANESBURGH.—In this case, on the 23rd July, 1923, as the result of an *ex parte* application by the appellants, their Lordships humbly advised His Majesty that special leave should be granted to the applicants to appeal to His Majesty in Council against a decree which had been made against them by the High Court of Judicature at Allahabad on the 22nd of February, 1916. The leave was so advised upon special terms as to the costs of the respondents, who are a very large body of holders of small properties in the abadi of the zemindari belonging to the appellants. The application was made by the appellants upon the ground that the decree against which they desired to appeal not only directly affected the properties claimed by the respondents, which did not themselves exceed in aggregate value the sum of Rs. 5,100, but that it indirectly affected the title of the appellants to other properties in the abadi, the aggregate value of which was far in excess of Rs. 10,000. An application for leave to appeal had on similar grounds been unsuccessfully made by the appellants to the High Court, but their Lordships make no reflection adverse to the appellants upon the terms in which their further application for special leave to appeal was made to the Board.

The respondents, however, have, in their printed case, stated as their first reason for affirming the decree that special leave to appeal should not have been granted because, as they say, there is no proof that the order appealed against indirectly affected the appellants' title to any property at all. As the result of the full investigation into all the facts and circumstances of an extremely complicated case which, with the assistance of counsel, their Lordships have now been able to make, they are quite satisfied that no plots of land in the abadi of the appellants' zemindari other than those claimed by the respondents are in fact affected by the decision appealed against. Indeed there is, in the judgment of the learned Subordinate Judge of Saharanpur, whose decree in their favour of the 27th September, 1913, the appellants seek to have restored by this appeal, a statement which proves that the other plots in the abadi to which the appellants have referred, stand, with regard to the zemindars, in a position quite different from those of the respondents.

In these circumstances this objection taken to the competence of the appeal, now that it is shown to be well founded, becomes of compelling importance. The respondents, a veritable

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crowd of people of slender means, have had their titles to their properties upheld by the decree of their own High Court. Only in the most exceptional circumstances would it be right to require them further to defend their title before the Board. No provision for their costs, however adequate, can be their sufficient protection against the risk involved.

It appears, accordingly, to their Lordships, that this appeal against them should not proceed further. Nor, as the objection to its competence is put in the forefront of their case, does it appear to the Board to be necessary that the respondents should be required by petition to apply that the order in Council giving the special leave should be rescinded. In the circumstances it will suffice if their Lordships advise His Majesty, as they will humbly do, that on the facts as now disclosed this appeal should not be further entertained. In fulfilment of the offer made by the appellants when they obtained special leave to appeal they must now provide for the respondents' costs as between solicitor and client, and the order as to costs will be to that effect.

Solicitors for appellants: *Douglas Grant and Dold.*

Solicitors for respondents: *Hardcastle Sanders & Co.*

K. J. R. *Appeal rejected.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, SIR LANCELOT SANDERSON AND SIR BINOD MITTER.

Sri Thakurji Maharaj and another .. *Appellants**

v.

Musammat Ram Dei .. *Respondent.*

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Purdanashin—Deed by, conferring benefit on person in a position to dominate her will—Onus of proof on latter in case of—Failure to discharge—Concurrent findings as to—Privy Council's interference with.

When the facts disclosed the relation of confidentiality between the respondent, a purdanashin lady, and the appellant, who was in a position to dominate her will, and a deed of endowment was executed by the lady which on the face of it was clearly harsh and unconscionable as regards her interests and to the material advantage of the appellant, *held,* that under these circumstances, the *onus probandi* was on the appellant, who sought to support the deed, to disprove undue influence.

Where the Courts below concurrently found that the appellant had not discharged the *onus* which lay on him, *held,* that the Privy Council could not disturb those concurrent findings.

Appeal No. 106 of 1928 from a judgment and decree, dated the 6th January, 1927, of the High Court, Allahabad (Mookerji

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and Ashworth, JJ.), which varied a judgment and decree, dated the 8th May, 1923, of the Subordinate Judge of Mainpuri.

The properties now in dispute originally belonged to the respondent's father Chiranjit Singh, and yielded an annual income of Rs. 3,100. He died in May, 1901, having left a will, dated the 16th March, 1901, and a widow Gopi Kunwar, and a daughter, Ram Dei (plaintiff-respondent), by another deceased wife. By his will Chiranjit Singh gave certain properties, yielding an annual nett income of Rs. 1,000 to his widow Gopi Kunwar for her life with a reversion to his daughter, Ram Dei, and devised and bequeathed the rest of his properties to his daughter absolutely.

The said Ram Dei, on the 31st August, 1918 (when she was 23 years of age) executed a power-of-attorney in favour of the appellant, Oudh Behari Lal, for management of her estate. On the 30th April, 1919, she executed a Tamliknama endowing all her properties in favour of Sri Thakurji Maharaj, appellant No. 1. The deed provided, amongst other things, that out of the annual income of the endowed properties, she was to get Rs. 600 a year for her maintenance for her life. It further provided that if "at the time of her death no male issue born of her be alive, then in every case Oudh Behari Lal (*i.e.,* Appellant No. 2) and after him his male issue shall be entitled to get the annual maintenance of Rs. 600 generation after generation".

On the 29th April, 1920, the plaintiff Ram Dei instituted the present suit to recover back possession of the said endowed properties on the allegation that she was an inexperienced purdanashin woman ignorant of legal proceedings who had been induced to put her signature on the deed of endowment, dated the 30th April, 1919, in consequence of the said Oudh Behari Lal exercising fraud and undue influence on her and without giving her an opportunity to think over and understand the matter and take independent advice.

The said Oudh Behari Lal and the other defendants filed written statements denying the plaintiff's allegations.

The Subordinate Judge framed several issues on the pleadings, but the following issue alone is material:—

"Was the Tamliknama in question executed by the plaintiff of her own free and independent will or owing to the fraud or undue influence of any of the defendants, and is the deed liable to be cancelled?"

The learned Judge held that it had not been proved that the plaintiff executed the Tamliknama owing to fraud practised on her by any of the defendants, but he found that the deed in question had been executed by the plaintiff under the influence of Oudh Behari Lal, Appellant No. 2. In the course of his judgment, he said:

"I am of opinion that it was Oudh Behari Lal's undue influence that led Ram Dei to execute the document. There is not much direct evidence

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on the point, nor could there be. But the circumstances of the case are quite sufficient to bear out the plaintiff's case."

The suit having been, accordingly, decreed, the defendants appealed to the High Court, and the learned Judges were of opinion that the finding of the Trial Court on the issue of undue influence was right. Mr. Justice Mookerji, in the course of his judgment, observed as follows:—

"Oudh Behari Lal was the nearest male relative of Musammat Ram Dei's father and had performed the ceremony of giving her away at the time of her marriage. Ordinarily, therefore, Oudh Behari would be regarded as the guardian of the plaintiff. The use of the word 'guardian' in respect of a female who has attained the age of majority may sound queer, but according to the custom of the country a female seldom acquires independence and she is mostly under the guardianship or care of some male relative, near or distant. . . It is clear that Musammat Ram Dei came under the influence of Oudh Behari Lal and that Oudh Behari Lal acquired a position to dominate the will of her. . . At the date of the execution of the deed of endowment she was a woman of 23. She was a purdanashin lady, and for all practical purposes a woman of no education. She was cut off from her husband and his relations. . . Thus, Musammat Ram Dei had very little hopes of love or protection from her husband or his relations. She was thus entirely thrown on the mercy and goodwill of Oudh Behari Lal who was her father's cousin and closest neighbour. It is also common ground that Oudh Behari took up the management of the plaintiff's property. It was thus that he assumed the position of almost a father towards Musammat Ram Dei. If then we find that the deed of endowment is to the material advantage of Oudh Behari Lal we must call upon him to explain how it came to be executed."

The learned Judge, after examining the deed, came to the conclusion that the principal object of the endowment was to benefit Oudh Behari Lal and his issues at the expense of even the children of Musammat Ram Dei, and he concluded his judgment in the following words:—

"Examining the deed closely, I have not the least doubt that in the garb of an endowment the document was meant to benefit Oudh Behari Lal, who, as I have already pointed out, was in a position to dominate the plaintiff's will. Oudh Behari has entirely failed to explain the genesis of the will. If we put to ourselves the questions which were put to themselves by their Lordships of the Privy Council in the case of *Mahomed Buksh Khan* v. *Hosseini Bibi*,[1] we shall see at once that the deed of endowment cannot stand. I hold that the document is voidable owing to the undue influence exercised by Oudh Behari Lal on the plaintiff. This would be enough for the success of the plaintiff."

Mr. Justice Ashworth, in a concurring judgment, added:

"I would point out that it was not necessary to hold that the plaintiff had proved undue influence affirmatively. The facts clearly show that Oudh Behari Lal was in a position to dominate the will of the plaintiff and that the document was so unreasonably in favour of Oudh Behari Lal as to justify its being held to be unconscionable. The burden of disproving undue influence was therefore on Oudh Behari Lal. This burden of proof is of importance because if the burden had been the other way it might

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1. (1888) L.R. 15 I.A. 81: I.L.R. 15 C. 684 at 698 (P.C.).

P. C.

Sri Thakurji Maharaj v. Musammat Ram Dei.

have been impossible for the plaintiff to rule out by her evidence the possibility of her having executed the document in a state of resentment against her husband. So long as the burden of proof is placed on the defendant this mere possibility will not help him. If it were placed on the plaintiff it might be sufficient to prevent her being held to have established affirmatively undue influence.''

Against the judgment of the High Court dismissing their appeal the defendants appealed to His Majesty in Council.

Dunne, K.C. and *Dube* for appellants.

Wallach and *B. B. Joshi* for respondents were not called upon.

3rd February, 1930. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This appeal raises what appears to be mainly, if not entirely, a question of fact. The facts found in both Courts below disclose that there was a relation of confidentiality between the two parties mainly concerned in the execution of the deed in question, and, further, those findings establish what appears on the face of the deed itself, that the deed was clearly harsh and unconscionable as regards the interests of the respondent. That being so, it was clear that it was essential for the appellants to excuse themselves from what would otherwise be the necessary implication arising on those facts. Both Courts below have found that there is no evidence on the part of the appellants which can afford such an excuse, and their Lordships are not prepared to disturb these concurrent findings. Accordingly they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Watkins & Hunter.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE ANANTAKRISHNA AIYAR.

In the Matter of the Debts and Securities of the Late G. A. Kuppuswami Nayagar (deceased).

K. Kesava Nayagar .. *Petitioner.**

Kuppuswami Nayagar, *In the matter of.*

Indian Succession Act (XXXIX of 1925) as amended by Act XVIII of 1929—Succession certificate—Jurisdiction of High Court to grant.

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*O.P. No. 231 of 1929. 4th November, 1929.

Kuppuswami Nayagar, *In the matter of.*

A succession certificate can be granted by the High Court on its Original Side under the provisions of the Indian Succession Act of 1925 as amended by Act XVIII of 1929.

Original Petition for the grant of a succession certificate under Part X of the Indian Succession Act by the High Court on the Original Side. The petition came on before Kumaraswami Sastri, J., in the first instance.

The referring order of the learned Judge was as follows:—

This is an application for the grant of a succession certificate in respect of certain shares standing in the name of the deceased, and the question is whether a succession certificate can be granted by the High Court under the provisions of the Indian Succession Act (XXXIX of 1925).

The Succession Certificate Act (VII of 1889) has been repealed and its provisions have been incorporated in Part X of the Indian Succession Act. In the Succession Certificate Act, "District Court'' was defined as meaning a Court presided over by a District Judge, and as the provisions of that Act referred to a District Court, no applications were made to the High Court for grant of succession certificates, as that Act in terms gave power only to District Courts to grant succession certificates.

There is no definition of "District Court" in the Indian Succession Act, and we have to fall back on the definition of "District Judge" in the General Clauses Act (X of 1897). Section 3, sub-clause (15) of the General Clauses Act defines "District Judge" as the Judge of a Principal Civil Court of Original Jurisdiction but shall not include a High Court in the exercise of its Ordinary or Extraordinary Original Civil Jurisdiction.

Part IX of the Indian Succession Act deals with the grant of Probate and Letters of Administration, and Chapter IV commencing with section 264 deals with the practice in granting and revoking Probates and Letters of Administration, and section 264 to 302 in Chapter IV refer only to the District Judge as the Judge who is to grant probate or letters of administration, and there is no power given to the High Court as such in this chapter.

Section 264 refers to the District Judge as having jurisdiction in granting and revoking Probates and Letters of Administration and the other sections also refer to District Judge.

Section 300 gives concurrent jurisdiction to the High Court. But concurrent jurisdiction can only give the High Court power in such cases where the District Judge would have had the power.

It does not confer any independent jurisdiction on the High Court. Section 300 says that

"the High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge."

In dealing, therefore, with the definition of District Judge, I think the same interpretation should be given to the word "District Judge" in Chapter IV, which refers to the grant of probates and letters of administration, as in Part X which gives the District Judge jurisdiction to grant succession certificates. It seems to me that if the definition of "District Judge" excludes the High Court altogether, the High Court cannot grant probate or letters of administration under the Indian Succession Act.

Clause 34 of the Letters Patent which gives the High Court jurisdiction in testamentary and intestate matters runs as follows:—

"And We do further ordain that the said High Court of Judicature at Madras shall have the like power and authority as that which may now be lawfully exercised by the said High Court, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, within or without the Presidency of Madras: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration."

The definition of "District Judge" as given in the General Clauses Act means a Judge of a Principal Civil Court of Original Jurisdiction, and this would apply to the High Court but with a proviso, and the proviso is that it shall not include a High Court in the exercise of its Ordinary or Extraordinary Original Civil Jurisdiction.

Ordinary and Extraordinary Original Civil Jurisdiction of the High Court is dealt with in clauses 11 to 21 of the Letters Patent. The heading is "Civil Jurisdiction of the High Court," and clauses 11 to 21 deal with Ordinary Original Civil Jurisdiction, Extraordinary Original Civil Jurisdiction and Insolvency Jurisdiction. Clauses 22 to 30 deal with Criminal Jurisdiction. Clause 31 deals with the exercise of jurisdiction outside the ordinary place where the High Court sits. Clauses 32 and 33 deal with Admiralty and Vice-Admiralty Jurisdiction. Section 34 deals with Testamentary and Intestate Jurisdiction.

Kuppuswami Nayagar, *In the matter of.*

It is argued by Mr. Tirunarayana Chariar that, under the Letters Patent, the High Court in the exercise of Ordinary Original Civil Jurisdiction only means the High Court exercising jurisdiction conferred by clauses 11 to 21 of the Letters Patent and cannot refer to any other Civil Jurisdiction (for example, granting probate) and that except when the High Court is exercising Ordinary Original Jurisdiction conferred by clauses 11 to 21, when the word District Judge is used, it must be taken to include the High Court when it exercises Original Civil Jurisdiction in matters such as granting probate, etc.

I think there is a distinction between the Original Jurisdiction of the High Court and the Ordinary Original Civil Jurisdiction of the High Court. All applications to the High Court are either civil or criminal. They are Original Civil when matters come for the first time to the High Court, and they are Appellate Civil when they come in the form of appeals. The granting of probates or succession certificates will come within the Original Civil Jurisdiction, but it would not come under Ordinary Original Civil Jurisdiction, which, by the Letters Patent, seems to be confined to suits and matters under clauses 12 to 21, which refer to the exercise by the High Court of its Ordinary Original Civil Jurisdiction.

In In the matter of *Candas Narrondas. Navivahu* v. *C. A. Turner*[1] the Privy Council considered the various jurisdictions conferred on the High Court by the Letters Patent and held that the Insolvency Jurisdiction was part of the Original Civil Jurisdiction having regard to the grouping of the clauses in the Letters Patent. Their Lordships at page 532 refer to clauses 11 to 18 as a group of clauses headed "Civil Jurisdiction of the High Court'' and they deal with this as one group.

Their Lordships observed:

"Sections 11 to 18 are a group of clauses headed 'Civil Jurisdiction of the High Court'. Sections 11 and 12 describe the local limits of the Ordinary Original Civil Jurisdiction which is said to extend to all kinds of suits within those limits except Small Cause suits. Section 13 gives to the High Court power to remove, and to try as a Court of Extraordinary Original Jurisdiction any suit falling within the jurisdiction of any Court subject to its superintendence, when it shall think proper, either on agreement of the parties, or for the purposes of justice. Sections 15 and 16 confer appellate jurisdiction. Section 17 confers authority over infants, idiots and lunatics. Section 18 ordains that the Court for relief of insolvent debtors shall be held before one of the Judges of the High Court, and

1. (1889) L.R. 16 I.A. 156: I.L.R. 13 B. 520 (P.C.).

Kuppuswami Nayagar, *In the matter of.*

that the High Court and any such Judge shall have powers as are constituted by the laws relating to insolvent debtors in India."

I think this case supports the view that for the purpose of determining the meaning of the words Ordinary or Extraordinary Original Civil Jurisdiction in section 3, clause 15 of the General Clauses Act, all that is excluded is the High Court acting under clauses 11 to 18 of the Letters Patent and that the High Court exercising any other Original Jurisdiction would fall within the definition of District Judge.

There is no reason why the High Court cannot grant succession certificate in cases where it could be granted outside Madras. Part X of the Indian Succession Act gives the limitation under which it could be granted. It cannot be granted where the law requires Probate or Letters of Administration to be produced, and there is no question of any evasion of stamp duty. There is no reason why there should be a facility for persons outside Madras in respect of collections of small debts and securities, such facility being denied to those in Madras.

The Indian Succession Act codifies the whole law on the subject, and repeals the Succession Certificate Act, and the omission in the Indian Succession Act of the definition of "District Court" given in the Succession Certificate Act is, I think, a matter which deserves notice in construing the definition of "District Judge". As I said before, the District Court is the Court which is referred to in the granting of Probates and Letters of Administration and it cannot be contended that the words "District Court" in those sections exclude the High Court.

I may state that in the Probate and Administration Act of 1881, "District Judge" is defined as meaning the Judge of a Principal Civil Court of Original Jurisdiction which obviously took in the High Court. But the Probate and Administration Act has been repealed by the Indian Succession Act of 1925 and the definition is omitted. So far as the succession certificate is concerned, it partakes the nature of a limited grant. Various forms of limited grants have fallen under the jurisdiction of Courts dealing with intestate matters in England (Tristam and Coote, p. 224), and I can see no difficulty in the High Court granting succession certificates under its general jurisdiction as regards matters falling within its Intestate Jurisdiction, unless wherever compelled by the definition of the words "District Judge" in the General Clauses Act, to hold that the High Court has no jurisdiction.

Kuppuswami Nayagar, *In the matter of.*

For the reasons given by me, I am of opinion that, having regard to the Indian Succession Act of 1925, which has repealed both the Probate and Administration Act and the Succession Certificate Act, and incorporated the provisions of these Acts in the body of the Indian Succession Act and has omitted to define the words "District Judge" leaving us to fall back on the definition of "District Judge" in the General Clauses Act, the High Court is a "District Court" when it does not exercise its Ordinary or Extraordinary Civil Jurisdiction conferred by clauses 11 to 18 of the Letters Patent.

As the matter is one of considerable importance, and is opposed by the Collector, and as several applications are likely to be filed for the grant of succession certificates, I think it is desirable that the question should be settled by a Bench.

M. A. Tirunarayana Chari with *S. T. Krishnamachari* and *M. A. Srinivasan* for petitioner.

The Advocate-General (*A. Krishnaswami Aiyar*) for the Crown.

The Court delivered the following

JUDGMENT.—Having regard to the amendment of the Act,* we consider that this petition is now maintainable in this Court, and order the case to be posted before the learned Judge in Chambers.

The Government Solicitor for the Crown.

N.S. *Reference answered.*

[**See* Act XVIII of 1929.—REP.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE CORNISH.

The Nedungadi Bank, Ltd. .. *Appellants** (*Defts.*)

v.

The Official Assignee of Madras .. *Respondent* (*Plff.*)

The Nedungadi Bank *v.* The Official Assignee of Madras.

Civil Procedure Code (*V of* 1908), *O. VI, R.* 5—*Order directing the defendant to give particulars within a certain time—No provision in the terms of the order for striking out the defence on default—Failure to comply with the order—Power of Court to strike out the defence.*

Where an order is made under Order VI, Rule 5 of the Civil Procedure Code directing the defendant to give particulars within a certain time and the defendant fails to comply with the order within that time, the Court has

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*O.S. Appeal No. 96 of 1929. 27th November, 1929.

jurisdiction to strike out his defence, even though it has not been made a term of the order that the defendant, on making default, shall be liable to have his defence struck out.

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Gauri Shankar v. *Musammat Manki Kunwar,* (1923) I.L.R. 45 All. 624 referred to.

Appeal against the judgment and order of the Hon'ble Mr. Horace Owen Compton Beasley, Chief Justice, dated 15th November, 1929 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 3446 of 1929 in C.S. No. 244 of 1929.

S. Doraiswami Aiyar, P. Govinda Menon and *K. S. Nair* for appellants.

M. P. Sundararaja Aiyar for respondent.

The Court delivered the following

JUDGMENTS. *Reilly, J.*—In this suit the plaintiff is the Official Assignee, representing the estate of Dumaine & Co., who have been adjudged insolvents. Dumaine & Co., it appears, were exporters of groundnuts, and in the course of their business they pledged a large quantity of groundnuts to the Nedungadi Bank, who are the defendants, received loans on these groundnuts, sold the groundnuts to various persons in other countries and had them shipped by the defendants, who received the bills of lading and the bills of exchange drawn on the purchasers and applied the proceeds of the bills of exchange after getting them discounted by another bank towards the repayment of the loans they had made to Dumaine & Co., crediting the balance to Dumaine & Co. The Official Assignee in this suit alleges that the defendants have not accounted for 7,169 bags of groundnuts and prays that they may be delivered to him or their value, about Rs. 1,50,000, or in the alternative that this sum of Rs. 1,50,000 may be paid to him as damages for conversion. The defendants after some delay put in their written statement. The plaintiff applied for an order for particulars, which was made by the Master. Eventually, when this matter came up before the learned Chief Justice on 15th November, 1929, the particulars had not been given in full, and the plaintiff applied that the defendants should be dealt with for contempt or that their defence should be struck out. The learned Chief Justice made an order that their defence should be struck out. The present appeal is against that order.

Reilly, J

Mr. Doraiswami Aiyar, who appears for the defendants, contends first that the learned Chief Justice had no jurisdiction to make that order, and secondly that it was not in the circum-

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stances a proper order to make. It will be convenient to deal with the question of jurisdiction first.

Rule 5 of Order 6, Civil Procedure Code, provides that a further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to costs and, otherwise, as may be just. Mr. Doraiswami Aiyar contends that that rule does not empower the Court to strike out the defence of the defendant if he does not give particulars when ordered to do so under the rule; and he has asked us to contrast that rule with R. 21 of O. 11, Civil Procedure Code, which provides that, where any defendant fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he shall be liable to have his defence struck out. Mr. Doraiswami Aiyar argued that the penalty of having the defence struck out is explicitly provided for in R. 21 of O. 11, but that it is not mentioned in R. 5 of O. 6, and that, he urges, is very significant. There is a contrast between the two rules. But, as Mr. Grant who appears for the plaintiff has pointed out, Order 11 does not deal with pleadings, and, therefore, it may have been thought necessary that, if the penalty for failure to answer interrogatories or to give discovery or inspection was to be provided in the shape of striking out pleadings, it should be explicitly set out, though that might not be necessary in an order dealing with pleadings and their amplification by particulars. It is interesting to notice that both R. 5 of O. 6 and R. 21 of O. 11, Civil Procedure Code, correspond to Rules of the Supreme Court in England. There is just the same contrast between R. 21 of O. 31 and R. 7 of O. 19 of the Rules of the Supreme Court as there is between R. 21 of O. 11, and R. 5 of O. 6 of our Code, and yet the contrast was not held by the Court of Appeal to be of any significance in *Davey* v. *Bentinck*,[1] which dealt with the dismissal of a suit for failure to give particulars and is equally applicable to striking out a defence for failure to give particulars. In that case a plaintiff was ordered to give particulars and a further order was made that, if he did not do so within a certain date, the suit would be dismissed. It was argued that R. 7 of O. 19 of the Rules of the Supreme Court, corresponding to R. 5 of O. 6, Civil Procedure Code, did not justify the dismissal of the suit because it only provided for particulars being called for upon such terms as to costs and otherwise as

1. (1893) 1 Q.B.D. 185.

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might be just, and the contention was that the terms could only be in respect of costs or some incidental matter. The Court of Appeal did not accept that contention. They held that under the Rules of the Supreme Court a condition might be added to the order for particulars that, if they were not given by a certain date, the suit should be dismissed. In this case it happened that, when the Master made an order for particulars, he fixed a date for those particulars to be given; but he did not say in so many words that, if the particulars were not given by that date, the defence would be struck out. Does that really make any difference in the matter? Mr. Doraiswami Aiyar's contention is that, because that threat was not added to the order, the defendants may take up the position that they were not warned that their defence would be struck out. But, if we examine the matter, I do not think that the absence of the threat or warning really makes any serious difference except in one respect. If the Master had said "Particulars must be given within a certain time, otherwise the defence will be struck out," except on an appeal from his order there might have been great difficulty in extending the time for giving particulars; but, as he fixed the time without any such penalty being explicitly added, the Court of course could have extended the time. There is no doubt about that. As a matter of fact on appeal Eddy, J., did not extend the time. I understand that, when the matter came up before the learned Chief Justice on 15th November, 1929, an oral application was made to him that he should extend the time. Undoubtedly that could have been done. But, when a time was fixed and the defendants disregarded it, they knew that they did so at their peril. The time might be extended: the time might not be extended. And, if the time was not extended, what would be the result? The particulars, which the Master had found necessary and which Eddy, J., on appeal had found necessary for the case, would not have been given. That means that the written statement of the defendants was an incomplete, insufficient and ineffective defence, and the result would simply be that the position of the defendants would be practically equivalent to that of a defendant who had put in no defence. If that is the correct way of viewing the matter, when the learned Chief Justice did not extend the time any further, the position was that the defendants had not put in a proper defence, and the case would naturally and properly go to the undefended board. Does it make any difference that the learned Chief Justice has added the words "I should strike out

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the defendants' defence," which do not appear in R. 5 of O. 6 of the Code. To my mind it makes no difference whatever. There is only one Indian case which has been quoted before us, dealing directly with this matter, *Gauri Shankar* v. *Musammat Manki Kunwar*.[2] In that case a Bench of the Allahabad High Court considered what the procedure in such a matter should be and gave directions to subordinate Courts how they should act in connection with orders for particulars. In the judgment of the learned Judges it is said that "Subordinate Judges should, when ordering particulars to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application, such payment should be made on or before the delivery of the particulars. If the order is disobeyed and the plaintiff is in default, he should have his action stayed, and, if the defendant is in default, his defence should be struck out". That appears pretty clear. But it has been suggested that what the learned Judges meant is only that, if the order for payment of costs is disobeyed, the defence of the defaulting party should be struck out. Let us examine that for a minute. What is contended is that, should the Court order particulars to be given and also order the defendant to pay costs at the time of filing his particulars, if he gives the particulars only but does not pay the costs, then his defence is to be struck out. Surely, *a fortiori*, if he does not give the particulars at all, the learned Judges would be of opinion that his defence should be struck out. I have no doubt that the learned Judges held the view that, when a defendant has been ordered to give particulars by a certain time and does not give them by that time or within the extended time, if there is an extension, his defence should be struck out. With that opinion I agree. That being so, it appears to me that the learned Chief Justice certainly had jurisdiction to make the order which he has made in this case.

There remains the question whether it was an appropriate order or rather whether it was an order with which there is any sufficient reason for us to interfere in appeal.

[The learned Judge after discussing with the evidence concludes]

In my opinion there is no sufficient reason for us to interfere with that order and this appeal should be dismissed with costs.

2. (1923) I.L.R. 45 A. 624.

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Cornish, J

Cornish, J.—I agree that this appeal should be dismissed. It has been contended that when an order is made under R. 5 of O. 6, Civil Procedure Code, for delivery of particulars, the Court has no jurisdiction to strike out the defence unless it has been made a term of the order that party on making default shall be liable to have his defence struck out. No doubt R. 5 of Order 6 contains no provision similar to the provision in R. 21 of O. 11 that a defendant who does not comply with an order for discovery shall be liable to have his defence struck out. But no similar provision in R. 5 of O. 6 is necessary, because R. 16 of O. 6 (and O. 6 is the order governing pleadings generally) contains the appropriate provision. Rule 16 of O. 6 says that

> "the Court may at any stage of the proceedings order to be struck out any matter in any pleading which may tend to prejudice, embarrass or delay the fair trial of the suit."

Now the whole object of obtaining particulars is to get a clearer or fuller statement of the opponent's case, so that the party applying for particulars shall not have to go to trial embarrassed by the obscurity or incompleteness of the case which he has to meet upon the pleadings. It seems to me, therefore, that the party who has been ordered to deliver particulars of his defence within a given time and fails to do so, comes within the reach of R. 16 of O. 6, and runs the risk of having his defence struck out unless he is able to satisfy the Court that he has some good excuse for not having complied with the Court's order. I think that in this case the more correct form of application would have been to strike out paragraphs 4 and 8 of the written statement. But this is not a point of substance, for it happens that the effect of striking out the pleas in those paragraphs is to leave the defendants with no defence, so that the result is the same. In my view, therefore, the Court had power under O. 6, R. 5 to make the order striking out the defence. The power to strike out a defence is a discretionary power. On the materials placed before us I am not prepared to say that the learned Chief Justice did not exercise his discretion rightly. But this aspect of the case has been fully dealt with by my learned brother and it is not necessary for me to add anything to what he has said.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

Ahmed Sait and others .. *Appellants**
v. *(Defendants)*
The Bank of Mysore, Ltd., by its Manager,
P. W. O'Brien ... *Respondent*
(Plaintiff).

Ahmed Sait *v.* The Bank of Mysore, Ltd

Company—Bank—Prohibition by the Memorandum of Association to lend money on mortgages—Lending of money on mortgage—Suit on the mortgage by the Bank—Maintainability.

A Bank which has lent money on a mortgage in spite of the prohibition by its Memorandum of Association to lend money on mortgages is entitled to sue on the mortgage to recover the money lent.

Appeal against the judgment and decree of the Hon'ble Mr. Justice Kumaraswami Sastriar, dated the 7th day of March, 1929, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 212 of 1928.

K. S. Krishnaswami Aiyangar, Ramaswami Aiyangar and *Srinivasavaradachariar* for appellants.

Sir C. P. Ramaswami Aiyar and *C. Narasimhachariar* instructed by *Messrs. Moresby and Thomas* for respondent.

The Court delivered the following

JUDGMENT.—This is an appeal from the judgment of our brother Kumaraswami Sastri, J., decreeing a suit by the Bank of Mysore based on a mortgage deed, dated the 6th May, 1925, for Rs. 1,00,000.

The plaint (paragraph 6) alleges that the defendants paid on the whole Rs. 18,672-2-0 up to 6th February, 1927, which the plaintiff Bank appropriated in a particular manner. The suit is to recover the balance. The defendants admit the allegations contained in paragraph 6 of the plaint but plead that "on account of the relationship existing between them and at their request, the said Sir Haji Ismail Sait has paid to the plaintiff the entire amount due on the mortgages referred to in the plaint. The actual date of the payments are not known personally to these defendants but they are informed and believe the same to be true that by 3rd March, 1926 or thereabouts the payments aforesaid by Sir Haji Ismail Sait were completed". The defendants also pleaded in the course of the trial as probabilising the above plea of discharge that Sir Haji Ismail Sait had a

*O.S.A. No. 41 of 1929. 22nd January, 1930.

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large sum of money amounting nearly to two lakhs belonging to them in his hands and that the payments made by Sir Haji Ismail Sait were made out of those funds. A third plea which was not raised either in the written statement or in the issues or at the trial before the Court below is that the Memorandum of Association of the plaintiff Bank prohibits the Bank from lending on mortgage, and the suit transaction is, therefore, void as being *ultra vires* and is not enforceable at the instance of the plaintiff.

The last point will be taken up first. The learned Advocate for the appellants relied on the decision in *Ashbury Railway Carriage and Iron Co.* v. *Riche*[1] and the decision in *Sinclair* v. *Brougham*[2] which follows it. In the first case it was held that a transaction which was *ultra vires* of the company could not be enforced against it. In the latter case questions of priority arose between the outside creditors, the unadvanced shareholders and the depositors of a building society formed under the Building Societies Act of 1836, the assets being insufficient to pay off all the claimants and it was held that the depositors were not entitled to priority over other claimants as the contracts of loan were *ultra vires*. The question before us is not similar to the questions raised in those two cases. In Brice on the Doctrine of *Ultra Vires* it was laid down that "property legally and by formal transfer or conveyance transferred to a corporation is in law duly vested in such corporation, even though the corporation was not empowered to acquire such property". Under the Indian Law a mortgage is a transfer of interest in immoveable property. The case of *Ayers* v. *South Australian Banking Co.*[3] is given as an illustration. There the transaction was *ultra vires* as it was prohibited by the charter of the company. Still it was held that the company could recover and Mr. Brice observed that the reasoning applies equally to reality. Another case relied on by the learned Advocate for the respondent is In re *Coltman. Coltman* v. *Coltman*,[4] in which the Court of appeal reversing the judgment of Fry, J., held that all contracts which were *ultra vires* were not necessarily illegal. This was a case of the trustees of a friendly society. In *Turner* v. *The Bank of Bombay*[5] it was held by Sir Lawrence Jenkins, C.J., and Tyabji, J., confirming the judgment of Russel, J., that notwithstanding section 37 of the Presidency

1. (1875) L.R. 7 H.L. 653.
2. (1914) A.C. 398.
3. (1869) 3 P.C. 548.
4. (1882) 19 Ch. D. 64.
5. (1901) I.L.R. 25 B. 52.

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Banks Act, the Bank was entitled to realise money lent on equitable mortgages. The above-mentioned decision in the *Ashbury Railway Carriage and Iron Co.* v. *Riche*[1] case was referred to by Russel, J., and the decision in *Ayers* v. *South Australian Banking Co.*[3] was applied and followed by the learned Judges. For examples of the same principle *The National Bank of Australia* v. *Cherry*[6] and *G. E. Railway Co.* v. *Turner*[7] were also relied on. Russel, J., observes that it is unfortunate that the words *"ultra vires"* should be used to describe two classes of cases, namely, those which are merely *ultra vires* and those which are also illegal. Following the above decisions we think that the Bank of Mysore is entitled to sue. It is unnecessary to describe what exact position the Bank occupies with reference to Sir Haji Ismail Sait on the facts of the case, that is, whether the Bank is a benamidar or a trustee or an agent of an undisclosed principal or does not occupy any of those positions.

I now proceed to the merits of the case of the three defendants.

[The learned Judge then discusses the evidence and concludes]

On a proper reading of the documentary and oral evidence in the case it is clear that the defendants' plea of discharge must be found against.

Agreeing with the Trial Judge we dismiss the appeal with taxed costs. We certify for two counsels.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

The Secretary of State for India in Council represented by the Collector of Tanjore .. *Petitioner** (*Respondent*)

v.

C. R. Subramania Aiyar .. *Respondent* (*Petitioner*).

The Secretary of State for India in Council v. Subramania Aiyar.

Land Acquisition Act (*I of* 1894), *S.* 18—*Reference under—Nature of the proceedings before the Court—Fresh case before the Court by way of*

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*C.R.P. No. 214 of 1929. 9th October, 1929.

1. (1875) L.R. 7 H.L. 653.
3. (1869) 3 P.C. 548.
6. (1869) 3 P.C. 299.
7. (1873) 8 Ch. 149.

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supplementary claims to compensation or otherwise—Power of Court to entertain.

The proceedings before the Court in the case of a reference under S. 18 of the Land Acquisition Act are in the nature of objections to the Collector's award and not a judicial inquiry independently undertaken into such questions as the claimant may raise and, therefore, it is not open to the claimant to make out a fresh case before the Court on such a reference, whether by way of supplementary claims to compensation or otherwise.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Principal Subordinate Judge of Kumbakonam, dated 8th November, 1928, and made in I.A. No. 348 of 1928 in O.P. No. 11 of 1928 on the file of the Court of the Subordinate Judge of Kumbakonam.

The Government Pleader for petitioner.

Salem Ramaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT.—This petition is preferred by the Secretary of State against an order passed by the Subordinate Judge of Kumbakonam in a land acquisition case. Certain land of the respondent was acquired and under section 10 of the Act (I of 1894) he put in a claim to compensation which was made up of the value of the land, of some cocoanut trees, and of two walls, together with a sum claimed as compensation for depreciation of his property. In due course an award was made and subsequently the respondent asked the Collector under section 18 to refer the matter for the determination of the Court. Before the Court he supplemented his claim by the addition of two new items, the cost of constructing new walls and the cost of erecting latrines. It was objected on behalf of the Government that the Court had no power to entertain such newly preferred claims. The learned Subordinate Judge, however, found that in certain circumstances section 25 gave him jurisdiction. He disallowed the claim in respect of the latrines but allowed it in respect of the walls. Against the latter part of the order this petition is filed.

Section 25 of the Act, upon sub-section (3) of which the Lower Court has relied, runs as follows:—

Section 25. (1) When the applicant has made a claim to compensation, pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under section 11.

(2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

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(3) When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the Court shall not be less than, and may exceed, the amount awarded by the Collector."

It will be seen that the section is concerned with the *maximum* and *minimum* amounts which the Court may award in each of the three cases: (1) where the applicant has made a claim before the Collector, (2) where without sufficient reason he has failed to make a claim, and (3) where with sufficient reason he has so failed. In the last of these cases the *minimum* is not to fall below the amount of the Collector's award, but no *maximum* has to be observed. That, it appears to me, is all that the section says, and I can read into it no authority whatever for the course which the Subordinate Judge has found himself open to take under it. It deals with the amount of compensation and not with the grounds upon which compensation should be awarded, and I see no reason to hold that because the amount awarded by the Collector may be exceeded, therefore grounds other than those on which the award was made may be entertained.

If, therefore, it is open to the Court to entertain fresh grounds, it must be by virtue of other provisions of the Act, or at least those other provisions must not conflict with such a course. Sections 23 and 24 respectively lay down what matters the Court shall, and what it shall not, take into consideration; but I do not think that it is sufficient to find the item of claim admissible under section 23 to hold that the Court may grant it. Under section 9 claims to compensation for all interests are to be made to the Collector, and under section 15 the Collector, equally with the Court, is to be guided by the terms of sections 23 and 24. In all ordinary circumstances, therefore, a claimant can and should present his case fully before the Collector, and should be held bound throughout the proceedings by what may be termed his pleadings. Turning then to section 18, it enables a person interested to require the Collector to refer the matter for the determination of the Court, "whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested." Under sub-section (2) he has to state the grounds on which objection to the award is taken. The proceedings before the Court are thus of the nature of objections to the Collector's award, and not a judicial inquiry independently undertaken into such questions as the claimant may raise. On this view, it would not be open to a claimant

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to make out a fresh case, whether by way of supplementary claims to compensation or otherwise. The point is practically bare of authority, the only apposite case cited to me being a decision to this effect by a Judge of the Punjab Chief Court in *Umar Bakhsh* v. *The Secretary of State.*[1]

It is objected that it ought to be within the power of the Court where, as here, grounds have been shown for failure to make the claim, or some part of the claim, before the Collector, to entertain it. I agree that section 25 might well have been so drafted as to provide not only, as it does, that the amount may be enhanced but that fresh grounds may be adduced; but in point of fact it does not so provide. Hardship from the absence of such a provision is not likely to arise often or in an acute form, and is, of course, no justification for the Lower Court's action if jurisdiction so to act is lacking. I allow the revision petition and set aside the order so far as it declares the claim admissible. Respondent will pay petitioner's costs in this Court.

N. S. *Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. OWEN COMPTON BEASLEY, *Chief Justice* AND MR. JUSTICE CURGENVEN.

Chigurupati Subbanna .. *Appellant* (Claimant)*

v.

The District Labour Officer, East Godavari .. *Respondent (Referring Officer).*

Subbanna v. The District Labour Officer, East Godavari.

Land Acquisition Act (I of 1894), Ss. 9 and 25 (2)—Notice to person to appear—Failure to appear—Subsequent appearance on a later date and mere filing of sale-deeds of adjoining lands—Omission to state; either orally or in writing, the specific value of the land—Effect—Claim for compensation, if can be said to have been made—Oral claim—Validity—Claim to be for precise or specific amount—Power of Land Acquisition Officer to grant an adjournment—Duty of Land Acquisition Officer to make an award even on the default of appearance of the claimant.

Where a person served with a notice under S. 9 of the Land Acquisition Act to appear on a certain date before the Land Acquisition Officer failed to appear before him on that date but appeared before him on a later date and merely filed two sale-deeds of lands adjoining the land sought to be acquired without stating, either orally or in writing, the specific value he placed upon the land and the nature of his interest therein,

Held, that the provisions of S. 9 (2) of the Land Acquisition Act were not complied with and the person omitted to make a claim for compensation within the meaning of S. 25 (2) of the Act.

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*Appeal No. 253 of 1928. 8th January, 1930.

1. (1918) 46 I.C. 906.

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A claimant under the Land Acquisition Act is not required necessarily to make his claim in writing so long as he makes a claim for compensation but the claim must be for a precise or specific amount.

It is in the discretion of the Land Acquisition Officer to grant an adjournment to the person interested in the land to make a claim.

Per Curgenven, J.—There is never any question of the land acquisition proceedings going by default. Even if the person interested in the land does not appear and make a claim, the Land Acquisition Officer must, to the best of his discretion, find out the true value of the land and make his award of compensation.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry, dated 3rd December, 1927, in O.P. No. 4 of 1927.

P. Somasundaram for appellant.

The Government Pleader for respondent.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *The Chief Justice.*—The appellant was served with a notice under section 9 of the Land Acquisition Act (I of 1894), Exhibit A. The date upon which he was called upon to appear was the 21st September, 1926. According to the Land Acquisition Officer the appellant did not appear on the 21st September. According to the appellant he did appear but appeared late and the Land Acquisition Officer was angry with him, but nevertheless allowed him to make his claim orally at a later date and allowed him to file two sale-deeds in respect of land close by the land under acquisition. On the 1st December the Land Acquisition Officer made his award and in that award he commenced by stating, "The landowner did not turn up and make any claim in response to the notice issued under sections 9 and 10 of the Act. He, however, filed copies of two sale-deeds which give a rate of Rs. 2,400 and Rs. 2,450 an acre" and then he proceeded to deal with those sales and show how those lands were distinguishable from the land comprised in the award and he eventually valued the land under acquisition at Rs. 1,800 per acre and awarded compensation accordingly with 15 per cent. allowance extra under the Act. The appellant was dissatisfied with this award and requested the Land Acquisition Officer to refer the case to the Court. It was accordingly referred by him to the Subordinate Judge of Rajahmundry on the 27th January, 1927. In that letter of reference the Land Acquisition Officer stated that the landowner did not turn up on the date of hearing fixed for enquiry and hence the amount of compensation awarded need not be enhanced under section 25 (2) of the Act.

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It is quite clear that, under section 25 (2) of the Act, if the applicant—the appellant in this case—has omitted without sufficient reason (to be allowed by the Judge) to make a claim, the amount awarded by the Court is in no case to exceed the amount awarded by the Collector; and therefore the point for consideration by the learned Subordinate Judge was whether the appellant had made any claim for compensation. It is argued here by Mr. Somasundaram on behalf of the appellant that the appellant did make a claim. First of all, he contends that the evidence of the appellant is to be accepted on this point, namely, that the Land Acquisition Officer gave him an adjournment and that he made a claim and supported it by the filing of these two sale-deeds already referred to. Admittedly two sale-deeds were filed because they were considered by the Land Acquisition Officer and are dealt with by him in his award. But the Subordinate Judge after hearing evidence on the point has not accepted the appellant's evidence that he made any claim. He regards his evidence as most improbable.

This case can be considered in two views, *viz.*: (1) that the appellant did not turn up on the 21st September or turned up too late, but nevertheless the Land Acquisition Officer said that he might bring forward his claim at a later date and that the applicant made a claim for compensation and as evidence of his claim produced these two sale-deeds, or, (2) that, having failed to turn up on the 21st September, the Land Acquisition Officer nevertheless allowed him to file the two sale-deeds. In the former alternative I am of the view that the provisions of section 9 (2) of the Act would have been complied with because the claimant is not required necessarily to make his claim in writing so long as he makes a claim for compensation and it is in the discretion of the Land Acquisition Officer to grant him an adjournment. Supposing he does not make a claim on the first day the Land Acquisition Officer can, if he chooses, adjourn the hearing and allow him to make a claim and, in support of this view we were referred to the decision of the Punjab Chief Court in *Secretary of State* v. *Sohan Lal.*[1] In that case the claimant did not put in a claim on the appointed date, but subsequently put in a written claim and it was held by the Punjab Chief Court that that was a sufficient compliance with the Act. But in this case there is no written claim at all and we merely have the evidence of the claimant himself that he made a claim and that evidence has not been accepted by the learned Subordinate Judge; and we

1. (1918) 44 P.C. 883.

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see no reason for disagreeing with the view he has taken with regard to that evidence. The case, therefore, is this that the claimant made no claim at all. He did not appear on the appointed day and therefore under the Act the Land Acquisition Officer had to use the best judgment he could and make his award in the absence of any claim. The mere fact of his having considered the two sale-deeds does not justify the argument that he must be held to have treated the amounts therein as the valuation placed upon the land by the claimant. It was his duty to make use of all the information available. Having made such an award it was not open to the Court to make any award in excess of the amount awarded by the Land Acquisition Officer. But we are asked to say that the filing of the sale-deeds amounted to making a claim for the amount which the sale-deeds show that the adjoining lands were sold for, namely, in the one case Rs. 2,400 and in the other Rs. 2,450 per acre and it is contended that that is a sufficient compliance with the provisions of section 9 (2) which is as follows:—

"Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice) and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent."

In this case the claimant was not required in the notice to make any statement in writing but we are satisfied that he did not like to make any statement orally. He placed no specific value upon the land, he did not state the nature of his interest in the land but merely contented himself with putting in the sale-deeds. Does that justify us in drawing the inference that the amount set out in the sale-deeds was the amount which he was claiming in respect of the land which was under acquisition? I am of the opinion that it is not open to us to do that because section 25 (1) says:

"When the applicant has made a claim to compensation, pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed *the amount so claimed* or be less than the amount awarded by the Collector under section 11."

The claimant has got to claim an amount. I am satisfied from a reading of that section and the other sections that a specific amount has got to be claimed. In these cases it is common for claimants in support of their claims to put in sale-deeds many in number and varying greatly in the amount of the

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purchase price. If no claim for specific amount is made, what amount is the Court to infer as claimed by the claimant? It may be the top purchase price or it may be the lowest purchase price or it may be the average purchase price, but no specific amount having been claimed if this contention is right it would be open to a claimant after an award has been made by the Land Acquisition Officer or by the Collector to go to the Court and say:

"The amount awarded is less than the amount which I really claimed. It is quite true that the evidence shows that other lands were sold for certain amounts but my real claim was for more than those amounts and I am entitled to an enhancement of the award made by the Land Acquisition Officer."

In my view, that contention is unsound. What the Act does require is that there should be a specific claim, namely, a claim which states in rupees the value the claimant places upon his property; and there has been no such claim here and, in my view, the provisions of section 9 (2) of the Act have not been complied with. This was the only point of importance which the learned Subordinate Judge had to consider and, disbelieving the evidence of the claimant, he came to the conclusion that no claim had been made and that, therefore, it was not open to him to consider any enhancement of the award made by the Land Acquisition Officer. I agree with him in his findings both on the facts and with regard to the law. The appeal must therefore be dismissed with costs.

Curgenven, J.

Curgenven, J.—I agree with my Lord and have little further to add except to point out that the first 'point for determination' framed by the learned Subordinate Judge, upon which this appeal has been preferred, does not really set out the scope of the case as it has been presented before us. The terms of that 'point' were whether the appellant appeared before the Land Acquisition Officer on the date fixed in the notice served on him and if not whether he had sufficient reasons for the omission. I should preferably have so framed it as to refer expressly to the terms of section 25 (2) of the Act, namely, whether the appellant omitted to make a claim for compensation pursuant to any notice given under section 9, and, if so, whether he had sufficient reason for the omission. The question for our determination, as my Lord has said, is whether what the appellant did, amounted to making a claim. There is certainly no evidence that he made any claim on the 21st September. As regards what happened on the 18th November,

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when he filed the two sale-deeds, he himself has stated in cross-examination that he filed a statement along with them. But even so, he does not claim that the statement comprised a precise claim to an amount of compensation, and his allegation is contradicted by the evidence of the Revenue Inspector. We must take it accordingly that either the mere filing of the sale-deeds constituted an implied claim or that no claim at all was made. It seems clear to me that according to the terms of section 25 (1) a claim must embody a precise amount claimed because that sub-section provides that the amount awarded may not exceed the amount so claimed. It may very well be, as decided in *Secretary of State* v. *Sohan Lal,*[1] that the mere circumstance that the claim was not made upon the date fixed in the notice does not deprive the Collector of jurisdiction to entertain it. Every Court and every officer exercising *quasi*-judicial functions has, I think, an inherent power to grant an adjournment. The case more apposite to the present one is *Orient Bank of India* v. *Secretary of State*[2] which dealt with what was contended to be a claim but which was not in fact a legally sufficient claim, preferred by the Bank in a land acquisition case. There too a sale-deed was filed and it was actually a sale-deed which included the property acquired. I think, therefore, that it is an untenable position to take up here that a claim in accordance with the terms of section 9 (2) was put in, nor am I prepared to say that in accepting the sale-deeds and in appreciating the evidence which they afforded the Collector waived the necessity for such a claim, whether or not he had jurisdiction to do such a thing. Under section 11 of the Act he is to enquire into the objections, if any, and make his award of the compensation which in his opinion should be allowed. There is never any question of such proceedings going by default. He must, to the best of his discretion, find out the true value of the land and I can see no objection to his using any material, even when it may be supplied by the applicant, without giving rise to the implication that he has recognised that a claim as required by the Act has been preferred. I agree accordingly that the appeal should be dismissed with costs.

N.S. *Appeal dismissed.*

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1. (1918) 44 I.C. 883. 2. (1926) I.L.R. 7 Lah. 416.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Chennubhotla Venkatasubbarayudu .. *Appellant** (*3rd Deft.*)

v.

Duvvuri Nagamma (died) and others .. *Respondents* (*Plffs.*).

Venkatasubbarayudu *v.* Nagamma.

*Mortgage—Prior and subsequent mortgages—Suit by the first mortgagee—Puisne mortgagee not impleaded—Decree for sale—Subsequent suit by puisne mortgagee on his mortgage—Decree for sale—Purchase in first mortgagee's suit subsequent to the date of the decree in this puisne mortgagee's suit—Sale of the property again under the puisne mortgagee's decree—Possession obtained by the latter purchaser in execution—Suit by the purchaser in the first mortgagee's suit to recover possession—Rights of the rival purchasers—*Lis pendens*—Applicability—T.P. Act, S. 52—New claim in second appeal that the plaintiff should be redeemed by the purchaser in the puisne mortgagee's suit—If can be allowed.*

A mortgage was executed by the owner and subsequently a second mortgage was executed over the same property to another person by the transferee of the equity of redemption. The first mortgagee filed a suit on his mortgage impleading the owner and the transferee of the equity of redemption as defendants but without impleading the puisne mortgagee as a defendant, obtained a decree for sale and the property was purchased by one of the sons of the transferee of the equity of redemption in execution of the decree. This purchase was made after a decree for sale was passed in a subsequent suit instituted by the puisne mortgagee on his puisne mortgage in which he impleaded the transferee of the equity of redemption and his sons as defendants. Afterwards, the property was again sold under the decree in the puisne mortgagee's suit and bought by a stranger who obtained possession in execution. The purchaser in the first mortgagee's suit brought a suit for recovery of possession of this property and prayed that, if he could not recover it, the purchaser in the puisne mortgagee's suit might be made to pay compensation.

Held, in second appeal—

(1) that, the puisne mortgagee not having been made a party to the prior mortgagee's suit, his rights were not in any way affected and the auction purchaser in his suit secured a valid title subject to the first mortgage interest vested in the purchaser in the first mortgagee's suit. *Chinnu Pillai* v. *Venkatasamy Chettiar,* (1915) I.L.R. 40 Mad. 77: 30 M.L.J. 347 referred to;

(2) that the purchase of the property by one of the sons of the transferee of the equity of redemption in the first mortgagee's suit was affected by *lis pendens*, the same having been made after the passing of the decree in the puisne mortgagee's suit against him, his father and brother;

(3) that the plaintiff having fought out his claim in the Lower Courts on the footing that the execution proceedings in the puisne mortgagee's suit were void, cannot be allowed to put forward a new claim in second appeal to the effect that the purchaser in the puisne mortgagee's suit should be compelled to redeem him if such a claim would then be barred.

Second Appeal against the decree of the Court of the Subordinate Judge of Narsapur in A.S. No. 6 of 1925, preferred

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*S.A. No. 1230 of 1926. 3rd December, 1929.

Venkata-subbarayudu v. Nagamma.

against the decree of the Court of the District Munsif of Narsapur in O.S. No. 658 of 1921.

K. Bhimasankaran and *B. Satyanarayana* for appellant.

G. Lakshmanna for respondents.

The Court delivered the following

JUDGMENT.—The property in suit was twice mortgaged, first by the original owner, Chenna Peribhotlu, and again by Yegyanna, the purchaser of the equity of redemption. The first mortgagee sued in O.S. No. 369 of 1897, making parties Peribhotlu and Yegyanna (with his sons), but not the puisne mortgagee, and obtained a decree. The puisne mortgagee sued in O.S. No. 184 of 1901, impleading Yegyanna and his sons, and obtained a decree on 15th November, 1901. After this decree, in 1902, the 4th defendant, through whom the plaintiffs (now respondents) claim, purchased the property in Court sale under the prior mortgagee's decree. The property was again sold under the puisne mortgagee's decree and bought by the 3rd defendant, who is the appellant before me. The question for decision is whether the title of the 4th or of the 3rd defendant is to prevail.

An answer in favour of each claimant may, if I construe them correctly, be derived from cases decided by this Court. Broadly stated, the one view is that the auction purchaser at the later sale—here the 3rd defendant—would buy nothing because the saleable interest of the judgment-debtor had already passed to the earlier auction purchaser; the other view is that the puisne mortgagee not having been made a party to the prior mortgagee's suit, his rights would not be in any way affected, and his auction purchaser would secure a title subject to the first mortgage interest vested in the first purchaser. Examples of the former line of argument are *Kutti Chettiar* v. *Subramania Chettiar*[1] and *Venkatagiri* v. *Sadagopachariar*[2]; of the latter, *Mulla Vittil Seethi* v. *Achuthan Nair*[3] and *Chinnu Pillai* v. *Venkatasamy Chettiar.*[4] In the first of these cases the puisne mortgagee sued first and sold first, and the view taken was that "both the mortgagees have an equal right to sell the property, and once it is sold at the instance of one mortgagee there is no further saleable interest left in the judgment-debtor to be sold again". That, no doubt, is indisputable. The only question

1. (1909) I.L.R. 32 M. 485: 19 M.L.J. 728.
2. (1911) 22 M.L.J. 129.
3. (1911) 21 M.L.J. 213 (F.B.)
4. (1915) I.L.R. 40 M. 77: 30 M.L.J. 347.

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seems to be whether it necessarily settles the point. The next case in order of time is the Full Bench judgment in *Mulla Vittil Seethi.* v. *Achuthan Nair.*[3] The question referred was whether a first mortgagee who has bought in execution of his decree can sue to eject a puisne mortgagee with possession. The judgment contains an elaborate review of the case-law dealing with the rights of puisne mortgagees. It is urged that many of the observations made are *obiter*, but I do not think so; the learned Judges begin with the remark that there are conflicting decisions and that the source of the difficulty seems to lie mainly in arriving at a definite conception of the rights of the second mortgagee. What those rights are therefore had to be investigated. It was held that the subsequent mortgagee could not be affected by proceedings to which he was not a party, and 'if the rights of the puisne incumbrancer who was not made a party to the suit of the prior mortgagee are preserved in every respect, the right to sue for sale of the equity of redemption which existed previous to the suit by the first mortgagee must continue to remain after it.' It would seem that if the right to sue for sale remains, the right to sell remains, and with it the ability to give the purchaser a good title. But it would I dare say be going too far to use the passage above cited as authority for the proposition that the second mortgagee may sell behind the back of the first auction purchaser, though indeed the first sale was conducted behind his own back notwithstanding that he was a necessary party to the first mortgagee's suit. This Full Bench opinion was considered by Munro and Sankaran Nair, JJ., in *Venkatagiri* v. *Sadagopachariar*[2], another case of two competing sales. They remark what is no doubt true, that a different question was referred to the Full Bench, though it was apparently decided that a puisne mortgagee may sue the purchaser of the equity of redemption without redeeming the prior mortgage. Their own view is that the puisne mortgagee has a right to sell the property even after sale by the first mortgagee, but he can exercise that right only after redeeming the prior mortgage.

The rights of the two mortgagees in the matter of sale came up again for consideration by Coutts Trotter, J. (as he then was) and K. Srinivasa Aiyangar, J., in *Chinnu Pillai* v. *Venkatasamy Chettiar.*[4] The several cases which I have alluded to are reviewed by the latter learned Judge. Referring in particular to the argument relied on in *Venkatagiri* v. *Sadagopa-*

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2. (1911) 22 M.L.J. 129. 3. (1911) 21 M.L.J. 213 (F.B.).
4. (1915) I.L.R. 40 M. 77: 30 M.L.J. 347.

Venkatasubbarayudu v. Nagamma.

chariar[2] and the cases, that the judgment-debtor's interest having been sold there is nothing left for the puisne mortgagee to sell, he observes that this ignores the fact that the first purchaser purchases it subject to the rights of the second mortgagee to sell; and later on he thus criticizes the opposite view, with cogency, if I most respectfully say so:

"Therefore it comes to this: that the second mortgagee is entitled to, and must bring a fresh suit against the purchaser in the first sale to sell the property for the satisfaction of the second mortgage debt subject to which the first purchaser took, and that the whole of the proceedings taken by the second mortgagee to realize his security, which proceedings were regularly and properly constituted, in which he obtained the decree which he was entitled to get........become wholly infructuous not owing to any fault of his, but because a purchaser comes into existence *pendente lite,* whose purchase is in execution of a decree in a suit improperly constituted."

The learned Judges refused to regard the *dicta* in the Full Bench case *Mulla Vittil Seethi* v. *Achuthan Nair*[3] as *obiter*, approved them and deemed them to be binding on them, and dissented from *Venkatagiri* v. *Sadagopachariar*[2] and other cases to the same effect. At the end of his judgment Srinivasa Aiyangar, J., deduces seven general propositions. The last of these applies to the circumstances of the present case; and I propose to adopt this view of the law in preference to the view that no title can pass by the sale.

One of the conditions laid down in the above cited proposition is that where there has been a sale under the first mortgage the auction purchaser should be made a party. It has not been contended here that that condition was not satisfied. The 4th defendant, who bought the property in the sale under the first mortgagee's decree, is a son of Yegyanna, the transferee of the equity of redemption. The learned District Munsif found, indeed, that this purchase was on behalf of the joint family, in other words, by the holder of the equity of redemption. The learned Subordinate Judge differed from him on this point. The propriety of the Subordinate Judge's finding is questioned here but on the view I take I do not think it is necessary to pronounce upon it. In the second suit Yegyanna and his sons were impleaded as the mortgagors, so that in that capacity the 4th defendant was before the Court which ordered the sale now in dispute. It is perhaps worth repeating that the 4th defendant did not buy the property until after the decree in O.S. No. 184 had been passed against him and his father and brothers. The principle of *lis pendens,* I think, applies to his purchase.

2. (1911) 22 M.L.J. 129. 3. (1911) 21 M.L.J. 213 (F.B.).

I consider, therefore, that the appellant is entitled to possession of the suit property as against the 4th defendant and the plaintiffs who derive title from him. The 3rd defendant holds the property subject to the first mortgage rights acquired by the purchaser under the earlier sale. The plaintiffs sued for possession and prayed that if they could not recover it, the 3rd defendant might be made to pay compensation to them. Neither of these prayers can be granted. They ask me to compel the 3rd defendant to redeem them. This would be to allow them to put forward newly an alternative case, and ask for an alternative relief, after fighting their claim on the footing that the execution proceedings were void. It appears that the 3rd defendant has been continuously in possession of the property since 1915, and under Art. 132 of the Limitation Act such a claim, if now preferred, would be barred. In these circumstances I do not think that I ought to comply with the request.

The result accordingly is that the second appeal is allowed and the plaintiffs' suit dismissed, with costs of 3rd defendant throughout.

N.S. *Second appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD ATKIN, LORD RUSSELL OF KILLOWEN, AND SIR GEORGE LOWNDES.

Rustomji Ardeshir Cooper .. *Appellant**

v.

Dhairyawan Annasaheb Narandas Thakersey Mulji and others .. *Respondents.*

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Deed—Construction of—Conduct of parties subsequent—Evidence of—Admissibility—Surrounding circumstances—Reference to—Permissibility—Sale of land—Contract for—Completion of—Omission of parties to fix time—Effect—Specific performance of contract—Suit for—Laches when a bar to.

Where the question is one purely of the construction of a contract for sale, and there is no difficulty as to the meaning of words, the subsequent conduct of the parties is irrelevant. The question must be decided upon the terms of the written agreement construed, so far as may be, in the light of the surrounding circumstances.

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*P.C. Appeal No. 103 of 1928. 21st January, 1930.

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Held, on the evidence, that no time was fixed for completion of the sale by the written contract for sale as subsequently varied by agreement, and that it must, therefore, be implied that it was to be completed in a reasonable time.

In a suit by the appellant for specific performance of a contract for the sale of land as varied by subsequent agreement, the main defence of the respondents in the Courts below and before the Privy Council was that the suit was premature. Before the Privy Council, they raised an alternative plea that the appellant had lost his right to specific performance by his delay.

There was no suggestion that the position of the purchaser had been so prejudiced by the appellant's delay in seeking specific performance that it would be inequitable to enforce it. It also appeared that all the delay, such as it was, could not be ascribed to the laches of the appellant, and that the purchaser was professing willingness to complete only a few days before the commencement of the suit.

Held, under the circumstances, that the alternative plea was curious, and that there was in any event no substance in it.

Appeal No. 103 of 1928 from a decree of the High Court, Bombay, dated the 5th December, 1927 (Marten, C.J., and Crump, J.), reversing a decree of that Court in its Ordinary Original Civil Jurisdiction, dated the 21st January, 1927 (Talyarkhan, J.).

The appellant who was the plaintiff in the suit sued the original defendant for specific performance of an agreement, dated the 18th December, 1920 and for other relief. The defendant died pending the hearing of the suit and the present respondents were substituted as legal representatives.

The Trial Judge passed a decree in favour of the plaintiff for specific performance and for the payment by the defendants of certain moneys, the plaintiff's claim in other respects being disallowed. The plaintiff appealed against the decree on certain of the points decided against him; the defendants appealed against the decree on all points decided against them. The Appeal Court (Marten, C.J. and Crump, J.) allowed the defendants' appeal and dismissed the plaintiff's appeal and cross-objections, the result being that the plaintiff's suit was dismissed with costs throughout.

The facts of the case, as well as the material terms of the agreement in suit, are sufficiently fully set out in their Lordships' judgment.

H. du Parcq, K.C. and *S. Hyam* for appellant.

Upjohn, K.C., Sir T. J. Strangman and *G. R. Upjohn* for respondents.

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21st January, 1930. Their Lordships' judgment was delivered by

SIR GEORGE LOWNDES.—The dispute in this appeal is as to the appellant's right to specific performance of an agreement for the sale of land. The facts are of an unusual character and make the determination of this question a matter of considerable difficulty.

The appellant was, in the year 1920, the owner of a plot of land with a four-storeyed building upon it situated opposite the Mulji Jetha Cloth Market in Bombay. Parts of the building were in a dilapidated condition, and in February of that year the Municipality served him with notice to pull down certain portions of three of the upper floors which appeared to be dangerous. The appellant was advised to rebuild, and had plans prepared and submitted to the municipal authorities, but they were not approved. Meanwhile, he was in negotiation with one Narandas Thakersey Mulji, who was a director of the Cloth Market Company and interested in the development of the site, which was evidently a valuable one, and on the 18th December, 1920, an agreement was come to between them under which the appellant was to sell and Narandas was to buy an undivided half share in the property which was thereafter to be let out to tenants upon the joint adventure of the two. The terms of this agreement were reduced to writing and it is necessary to set out the more material clauses *in extenso*:—

"1. The vendor shall sell and the purchaser shall buy an undivided half share in the said property for the sum of Rs. One lac ninety thousand.

"2. The vendor shall forthwith carry out all the repairs and works specified in the said notice. . . . from the Municipality and the purchaser shall pay in addition to the said sum of Rs. One lac ninety thousand half of the expenses incurred in carrying out the requirements of the said notice.

"4. The sale shall be completed within two months from the date of this agreement if the requirements of the said notice are carried out before that period. If the requirements are not carried out within the said period then the sale shall be completed within two weeks after all the said requirements have been carried out and completed and the property is fully occupied by the tenants.

"5. The vendor shall within seven days of the date of this agreement hand over to the purchaser's attorneys all documents of title for investigation of title.

"8. After completion of the purchase the purchaser shall attend to the management of the property and shall collect the rents of the entire property and shall keep regular account thereof."

Then followed detailed provisions for the division of the net rents under which Narandas was to have a preferential

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6 per cent. on his capital expenditure, any deficit being made good by the appellant and charged on his moiety of the property, for the creation of a reserve fund, for auction between the parties if either wished to sell his share, and for arbitration in case of disputes. The property was described in a schedule to the agreement as a parcel of land containing by admeasurement 101 square yards or thereabouts "with the messuage tenement or dwelling-house standing thereon," situate at Champa Gully, and bounded, etc.

There is, no doubt, therefore, that the sale was to be of a small but valuable plot with an existing building upon it, and that before the appellant (the vendor) could demand completion and payment of the Rs. 1,90,000 he would have to comply with the terms of the municipal notice above referred to. Their Lordships think that having regard to the reference in clause 2 to "repairs and works" the intention was that the appellant should not merely pull down the portions referred to in the notice, but should also make them good again.

Within a few days after the execution of this elaborate document the parties agreed to a variation, which is the cause of all the difficulty. This new agreement was, unfortunately, not put in writing, and its bearing on the other terms of the original document was not considered. The variation was in effect that instead of complying with the terms of the municipal notice the building should be pulled down and a new building erected on the site, the costs of rebuilding being shared by the parties equally. What the new building was to be, who was to be responsible for its erection, and what it was to cost were matters apparently left over for future discussion, and it is obvious that if the question were whether either of the parties could specifically enforce the agreement as it then stood the answer must be in the negative. But this is not the question which the Board have to decide. The old building was demolished and their Lordships think it is established that this was done by Narandas; a new building was erected by the appellant according to plans approved by Narandas, and the whole cost was paid by the appellant. A conveyance was not executed, though the title-deeds had been with Narandas's solicitors for its preparation since the 20th December, 1920, and no demand was made by the appellant for completion until the 26th March, 1922, when the building itself was nearly finished. From this date onward the appellant, who was anxious to leave for Europe, continued to press, as his letters show, for a conveyance and payment both

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of the Rs. 1,90,000 and half the building costs. It seems clear, however, that Narandas was not anxious to go on. Probably land values were depreciating and the prospects of the joint venture were fading. On the 7th July his solicitors wrote that the requirements of the municipal notice had not been complied with, and that, therefore, under clause 4 the time for completion had not arrived. To this the appellant replied in effect that clause 4 had no application to the new building.

On the 12th July Narandas's solicitors gave the appellant notice that he must complete the building and get it tenanted within 15 days, failing which their client would hold him responsible for all loss caused thereby. On the 19th July they wrote again to the same effect, but extending the time for completion to the end of that month. There were difficulties as to drainage, and the appellant thought that Narandas was putting obstacles in his way. In August there was a reference to arbitration which dragged on till February, 1923, but proved abortive. The drainage difficulty was still unsolved as the municipality refused to pass the appellant's proposals. On the 28th March, 1923, Narandas's solicitors wrote:

"We are instructed to give you notice to complete the necessary drainage work, obtain the completion certificate and get the property tenanted within three months from the receipt hereof by you, time being the essence of the contract, and we have further to give you notice that if you fail to comply with the above requisitions within the time aforesaid our client will cancel the contract."

This seems to have brought matters to a head, and on the 5th* April, 1923, the appellant started the present proceedings one the Original Side of the High Court. In his plaint he vouched the original agreement, stated that by a subsequent agreement the old building was pulled down and a new one built upon the site, and that it was agreed that the costs of construction of the new building should be shared between him and Narandas. The drainage difficulties were referred to, the alleged obstruction by Narandas, the arbitration proceedings and the depreciation of the property, and the appellant prayed that Narandas should be ordered specifically to perform the original written agreement and to pay to him the Rs. 1,90,000 as the price of the half share sold, and also half the costs of the new building. Other reliefs were asked for which are not now material.

Narandas defended the suit. In his written statement he admitted the agreement of the 18th December, 1920, and the subsequent variation. He denied that he had obstructed the

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appellant in any way; he relied upon his solicitor's notice of the 28th March, 1923, and said that owing to the appellant's failure to complete the building within the time thereby limited he had cancelled the contract, and he accordingly denied that the appellant was entitled to any relief and claimed the dismissal of the suit.

Paragraph 6 of his written statement with reference to the variation was as follows:—

"After the agreement (meaning the agreement of the 18th December, 1920) was entered into it was agreed between the parties that instead of complying with the terms of the municipal notice the building should be pulled down and a new building should be erected on the site. The original agreement stood varied accordingly."

No reference was made to the agreement for sharing the costs of the new building, but it was admitted before the Trial Judge and has not been disputed before this Board.

In the Court of Appeal the appellant amended his prayer and asked for specific performance of the original agreement as varied. Their Lordships are somewhat embarrassed by the fact that the actual amendment made is not printed in the record, there being only a quite inaccurate reproduction of the Chief Justice's note of the application to amend.

On the 26th June, 1924, before the suit came to trial Narandas died and the respondents now represent his interests.

The principal question which has been argued in the present appeal is whether clause 4 of the agreement of the 10th December, 1920, applied after the variation. At the time the suit was instituted it is admitted that the new building was still without drainage and was untenanted, and in fact, untenantable. The contention of the respondents was that the effect of the parol variation was merely to substitute the erection of a new building for the partial demolition, and repair of the old building, so that the new building, not having been erected within the two months allowed by the first part of clause 4, the completion of the sale of the half share of the property would have to wait until the building was finished and fully tenanted. Much reliance was placed by the respondents' counsel upon the words in Narandas's statement above quoted (which it was said both Courts had accepted) that "the original agreement stood varied accordingly," as meaning that apart from the substitution of new erection for repair all the terms of the original agreement were to stand. If this is the true effect of the agreement which the parties made, it is clear that the suit as a suit for specific

performance of the contract of sale was premature and must fail; it being admitted by the appellant that the suit was one for specific performance only and not for damages.

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The appellant, however, contended that clause 4 had no application to the varied contract and that the effect of the agreement to erect a new building was to relieve him altogether of his obligation to do the repairs necessitated by the municipal notice, and that, therefore, the term for completion fixed under the original agreement as dependent upon the repairs must go out altogether leaving only the implication of law that the contract was to be completed within a reasonable time (Indian Contract Act, section 46). He did not allege any specific agreement that clause 4 should be deleted any more than the respondents alleged a specific agreement for its retention. His contention was that it ceased to be applicable and necessarily disappeared: that its disappearance was consequential upon the dropping of the repairs, and was in no way inconsistent with the statement that "the original agreement stood varied accordingly". This apparently was the effect of the appellant's amendment, and if it is the true construction, it is, in their Lordships, opinion, almost equally clear that the appellant must succeed.

Elaborate and carefully argued judgments were delivered by the Trial Judge and by the two Judges of the Court of Appeal, and upon this point, which, in their Lordships' view, is the pivot upon which the decision of the case must turn, they differed fundamentally. Talyarkhan, J., by whom the suit was tried, sums up his conclusions as follows:—

"For the reasons stated above I find that clause 4 did not apply, and the contract, therefore, became one to be performed within a reasonable time, and, as already stated, all that the plaintiff had to do was to execute the conveyance on receipt of the consideration which both his evidence and his correspondence show he was always ready and willing to do."

The Chief Justice in the Court of Appeal says:

"In the result then I would hold that clause 4 applied to the varied agreement, and that in the events which happened the second branch of that clause applied, and consequently, completion was not to take place until two weeks after the new building had been completed and fully occupied by tenants."

And his colleague, Crump, J., is to the same effect:

"If there was a contract, and admittedly there was, my conclusion is that the time fixed by clause 4 was intended to be applicable *mutatis mutandis*, and that plaintiff was not entitled to demand a conveyance until the new building was completed and fully tenanted. The plaintiff's suit was therefore bad at the date of the institution. The plaintiff at that date had not performed his part of the contract."

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Each of the three judgments discussed at length the conduct of the parties subsequent to the varied agreement. The learned Trial Judge thought it important to see whether their conduct and acts were consistent with the applicability of clause 4, and he was satisfied that neither of them acted in this belief. The Chief Justice, though evidently doubting whether in such a case subsequent conduct was relevant, came on his own analysis of the facts, as disclosed by the voluminous correspondence, to exactly the opposite conclusion, and his learned colleague in the Court of Appeal was of the same opinion; but in their Lordships' view where, as in the present case, the question is one purely of construction, the subsequent conduct of the parties is irrelevant. There is no difficulty here as to the meaning of words, and such cases as *Attorney-General for East African Protectorate* v. *Watchman*[1] have no application. It may well be, as the correspondence suggests, that Narandas's advisers thought that clause 4 was applicable, and that the appellant thought it was not, and that each acted upon his own belief. The fact that the appellant made no demand for completion of the sale until the new building was nearly finished was not necessarily inconsistent with his present claim. He was trying to induce Narandas to take the other half of the plot off his hands, and may have been waiting for this to eventuate. If he had demanded completion before the new building came into being he might have been met with the objection that the agreement was one and indivisible and too uncertain to enforce. In the same way the fact that Narandas himself demolished the old building and quite possibly kept the proceeds of demolition, and that he retained the title-deeds of the property would be by no means conclusive of his part ownership.

Their Lordships, however, feel no doubt that the question propounded must be decided upon the terms of the written agreement and of the agreed variation construed, so far as may be, in the light of the surrounding circumstances. They feel that there is force in the respondents' argument that the subject of the agreement was essentially something capable of producing profits and that until this was brought into being, either under the original agreement by making the old building tenantable, or under varied agreement by the erection of a new building he was under no obligation to buy. They think that this was so under the original agreement; it seems to be implicit in

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1. (1919). A.C. 533.

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clause 8; but to say that, therefore, it was of the essence of the varied agreement, comes very near to begging the question. If it were so why was not the obligation to erect the new building laid in terms upon the appellant? Yet, even as pleaded by Narandas in his written statement, no such obligation was imposed, nor was there any indication of what the new building was to be. It was contended in the Courts in India that rebuilding was covered by the terms of the original agreement, but this argument was rightly rejected in both Courts. Before the Board the contention was that as the variation merely substituted rebuilding for repair the obligation was necessarily upon the appellant inasmuch as he had agreed to do the repairs, but this again seems to their Lordships to be rather a forced deduction.

On the best consideration which their Lordships can give to a question of much uncertainty they think that this argument cannot prevail. The subject-matter of the varied agreement—a new building of unknown character and extent, of unknown cost, and to be erected by one or other of the parties, or possibly by both together—was such an entirely different proposition from the execution of certain definite repairs to an existing building to be done by the owner under the requisition of a public authority, that it is, in their Lordships' opinion, impossible either to deduce from the facts or to assume that conditions which were to apply to the latter case would be equally applicable to the former. Their Lordships find themselves unable to draw this conclusion either from the terms of the variation as pleaded by Narandas or from the silence of the parties as to the details of the new scheme. The surrounding circumstances to which it is legitimate to resort throw no light upon the question. It is true that prior to the original agreement the appellant had had plans for a new building prepared, but they had been rejected by the municipal authorities, and it is not suggested that Narandas had agreed to them or that the varied agreement had any relation to them. All that the parties had agreed to was that there should be a new building, the character and cost and the responsibility for the erection of which were left indefinite.

In particular with regard to clause 4 of the original agreement, their Lordships are unable to hold that it was, or must have been, intended to remain applicable to the new development. The appellant may well have been content to wait for his purchase money—for that is all that completion meant to him—until he had done the comparatively small repairs which the old

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building required; they were quite definite, and apparently could be done without difficulty in the two months; but it can hardly be assumed that he would be equally content to defer his right to payment as indefinitely as the varied contract with clause 4 applying *mutatis mutandis* would necessitate. Had this been in any sense the intention of the parties their Lordships think that there must have been a much more definite specification of the new building and much more definite provisions as to its erection. That the original agreement was to "stand varied accordingly," if this is to be taken as part of the actual agreement come to and not merely as Narandas's understanding of what was implied, meant no more, in their Lordships' opinion, than that such terms as were applicable to the new scheme should stand, and such as were inapplicable, should go out, leaving it, in the event, for the Courts to decide which were and which were not so applicable.

The result is, as their Lordships hold, that no time was fixed for completion of the sale under the varied contract, and that it must be implied that it was to be completed in a reasonable time, which had clearly elapsed by the date of the institution of the suit.

It was argued by the respondents that even assuming this to be the case the appellant had lost his right to specific performance by his delay. This is in one sense a curious argument: the main defence with which their Lordships have dealt in detail was that the suit was premature; this alternative contention would make it too late. But it is not suggested that the position of the purchaser had been so prejudiced by appellant's delay in seeking specific performance that it would be inequitable to enforce it, and apart from this the Indian Limitation Act* allows him three years to sue. Their Lordships also doubt whether all the delay, such as it was, can be ascribed to the laches of the appellant, who was left to finance the rebuilding without any assistance from his would-be partner, and it is obvious that he was faced with considerable difficulties. It is also clear from Narandas's notice of the 28th March, 1923, that he was professing willingness to complete only a few days before the present proceedings were commenced. Their Lordships think, therefore, that there is no substance in this alternative plea.

The Trial Court and the Court of Appeal differed, as they did on most points, on the question whether the three months limited by this notice was reasonable, but, on the view which

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their Lordships take of the construction of the contract this question is immaterial.

In the result their Lordships hold that the appellant is entitled to specific performance of the contract of sale and to payment of a half share of the costs of rebuilding.

Their Lordships will humbly advise His Majesty that the decree of the High Court, dated the 5th December, 1927, should be varied by reinstating the decree of the Court of first instance dated the 21st January, 1927, the reference therein to the agreement of the 18th December, 1920 being qualified by the addition of the words "subject to the variation referred to in the 6th paragraph of the plaint as amended" but maintaining the High Court's dismissal of the appellant's appeal to them, Appeal No. 14 of 1927. The case will be remitted to the High Court to apportion the costs incurred in the two Appeals Nos. 14 and 22 of 1927, and the appellant will pay to the respondents the costs properly attributable to Appeal No. 14 and will receive from the respondents the costs of Appeal No. 22 together with three-quarters of his costs before this Board. He will pay to the respondents such costs as they may have incurred on this petition for the admission of further evidence.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—VISCOUNT DUNEDIN, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Wali Mohammad and others .. *Appellants**

v.

Mohammad Bakhsh, since deceased, and others. *Respondents.*

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Wali Mohammad *v.* Mohammad Bakhsh.

Civil Procedure Code (V of 1908), S. 100—Interference under—Jurisdiction—Conditions—Finding of fact based in part on documentary evidence—Interference with—Mortgage—Sale by mortgagor to mortgagee subsequent to—Onus of proof of—Finding as to—Law or fact.

Where in a suit for redemption of a usufructuary mortgage for a term, the mortgagees admit the mortgage sued upon, but plead a subsequent sale of the mortgaged property to them, the *onus* is on the mortgagees to show that the mortgage had been extinguished by subsequent sale.

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*P.C. Appeal No. 31 of 1929. 16th December, 1929.

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The question whether there had been such a sale or not is a question of fact, and it does not cease to be such a question merely because some of the items of evidence adduced to prove the sale consist of entries in the record of rights prepared under the Punjab Land Revenue Act (XVII of 1887).

The question whether a statutory presumption is rebutted by the rest of the evidence is always a question of fact.

Questions of law and fact are no doubt often difficult to disentangle, but, as regards jurisdiction to interfere in second appeal under S. 100 of Civil Procedure Code, the following propositions are clearly established:—

(1) There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross the error may seem to be.

(2) The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact.

(3) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights but were really historical materials, have to be construed for the purpose of deciding the question.

(4) A second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first Appellate Court had made a mistake as to its meaning.

Mussummat Durga Choudhrain v. *Jawahir Singh Choudhri*,[1] *Nafar* v. *Shukur*,[2] *Midnapore Zemindary Co.* v. *Uma Charan Mandal*,[3] *Nowbut Singh* v. *Chuttur Dharee Singh*[4] and *Kumeda Prosunna Bhuiya* v. *The Secretary of State for India in Council*[5] relied on and approved.

Dhanna Mal v. *Moti Sagar*[6] distinguished.

Judgment of the High Court affirmed.

Appeal No. 31 of 1929, by special leave, from a decree of the High Court, Lahore (Broadway and Fforde, JJ.), dated the 3rd January, 1924, affirming a decree of the Additional District Judge of Sheikhpura, dated the 26th March, 1923, which reversed a decree of the Senior Subordinate Judge of Sheikhpura, dated the 20th January, 1923.

The facts of the case may be summarized as follows:—

The plaintiffs-respondents were the mortgagors of the lands in dispute, which they mortgaged to one Miran Bakhsh with possession for Rs. 1,200 by a registered deed of mortgage, dated the 15th March, 1880, for a term of 20 years. The mortgagee agreed to take the rents and profits of the property in lieu of interest on the mortgage-debt, and it was provided that the mortgagors would be entitled to redeem the mortgage after the expiry of 20 years. On the 17th November, 1920, the mortgagors (plaintiffs-respondents)

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1. (1890) L.R. 17 I.A. 122: I.L.R. 18 C. 23 (P.C.).
2. (1918) L.R. 45 I.A. 183 at 187: I.L.R. 46 C. 189 (P.C.).
3. (1923) 29 C.W.N. 131: 45 M.L.J. 663 (P.C.).
4. (1873) 19 W.R. 222.
5. (1914) 19 C.W.N. 1017.
6. (1927) L.R. 54 I.A. 178: I.L.R. 8 Lah. 573: 52 M.L.J. 663 (P.C.).

filed the present suit to redeem the mortgage on payment of the mortgage-debt of Rs. 1,200 against the mortgagee and the appellants, who were the purchasers of the rights of the mortgagee.

The appellants (defendants) denied the right of the plaintiffs to redeem the mortgage on the ground that they (the defendants) had purchased the equity of redemption from the mortgagors by an oral sale for Rs. 800 in or about 1892. The mortgagors denied this allegation, and this question was the sole issue for determination between the parties and was found against the appellants (defendants) by the Additional District Judge on first appeal, and the High Court held that it had no jurisdiction to interfere with the said finding of fact on second appeal.

The learned Trial Judge put the issue between the parties in the following words:—

1. Does the relation of mortgagor and mortgagee exist between the plaintiffs and defendants 3 to 7?

4. Was the land in suit sold to defendants 3 to 7 by the mortgagors Sultan and Mohammad Bakhsh?

Both parties produced oral and documentary evidence. The plaintiffs (mortgagors) objected at the trial that oral evidence of the sale of the equity of redemption was inadmissible, but the objection was disallowed, and the evidence was recorded.

In proceedings under the provisions of the Punjab Land Revenue Act, 1887, the appellants (defendants) were recorded as landowners in respect of the mortgaged lands in certain revenue papers prepared under section 31 of the Act. The section provides that the record of rights for an estate shall include the following documents, namely:—

(*a*) Statement showing so far as may be practicable—

(1) the persons who are landowners, tenants or assignees of land revenue in the estate, or who are entitled to receive any of the rents, profits or produce of the estate or to occupy land therein;

(2) the nature and extent of the interests of those persons, and the conditions and liabilities attaching thereto.

Section 44 of the Act provides as follows:—

"An entry made in a record of rights in accordance with the law for the time being in force, or in an annual record in accordance with the provisions of this chapter and the rules thereunder, shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor."

After examining the evidence the Trial Judge delivered judgment on the 20th January, 1923. He found the first and fourth issues mentioned above against the plaintiffs on the ground that section 44 of the Punjab Land Revenue Act, 1887, was presumptive evidence of title in favour of the appellants (defendants). He,

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therefore, made a decree dismissing the plaintiffs' suit and from that decree the plaintiffs appealed to the Additional District Judge, who delivered judgment on the 26th March, 1923.

After considering the authorities the learned Additional District Judge summed up the effect of the mutation proceedings in the following words:—

"From a consideration of these rulings it seems to me clear that though an entry in a revenue record is presumed under section 44 of the Punjab Land Revenue Act to be true, such entry of itself confers no title, and it is sufficient to prove that possession was originally obtained as a mortgagee to shift the *onus* so as to require the mortgagee to prove that the relationship of mortgagor and mortgagee has ceased to exist and he has secured a valid title as owner. I, therefore, hold that when the present defendants admitted the factum of mortgage the *onus* lay on them dispite the revenue entries in their favour to prove that they were in possession not as mortgagees but as owners."

The learned Appellate Judge then examined the evidence and came to the following conclusion:—

"The rulings already referred to by me, however, make it clear that the mortgagee cannot rely on presumptions, but must prove an out and out as well as valid sale before he can be allowed to usurp proprietary rights in the land mortgaged with him.

"In my opinion the evidence adduced by the defendants fails to discharge the *onus* laid upon them.

"In their pleas the defendants urged that the land was sold by Mohammad Bakhsh and Sultan for Rs. 2,000 and was then redeemed from Miran Bakhsh (the mortgagee). The evidence, however, is to the effect that the mortgagee rights of Miran Bakhsh were purchased four or five months prior to the acquisition of the equity of redemption.

"When there is a discrepancy in such broad facts what reliance can be placed on oral evidence relating to minor points in the transaction?

"Finding that the *onus* lay on defendants to prove that the mortgage no longer subsists, and that they have failed to discharge such *onus*, I accept the appeal."

The Additional District Judge, therefore, made a decree for redemption in favour of the plaintiffs, and from that decree the defendants appealed to the High Court, Lahore, and the appeal was heard by Broadway and Fforde, JJ., who delivered judgment on the 3rd January, 1924. It was contended before the High Court that

"the learned Additional District Judge had not attached that weight to the presumption of correctness of the entries that was due to them owing to the provisions of section 44 of the Punjab Land Revenue Act, 1887."

But the learned Judges of the High Court repelled the contention, observing:

"Now it cannot be denied that such revenue records as have been produced show the appellants (defendants) as owners of this land and section 44 of the Land Revenue Act undoubtedly enacts that entries in such records shall be presumed to be correct. The learned Additional

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District Judge has, however, fully realized this aspect of the case and has considered and weighed this evidence with all possible care."

The High Court concluded their judgment in the following words:—

"Mr. Hasan Imam (counsel for the defendants) admitted that the *onus* of proving the sale lay on his clients. Whether a sale had or had not been effected is a question of fact and this question has been decided against the appellants (defendants) by the learned Additional District Judge. In coming to his decision the learned Additional District Judge has not contravened any legal principles and we are not, therefore, competent to examine the correctness of his finding."

Against the decree of the High Court dismissing the defendants' appeal, they now appealed, by special leave, to His Majesty in Council.

The judgment of the High Court is reported in I.L.R. 5 Lah. 84.

De Gruyther, K.C. and *Wallach* for appellants.

Dube for respondents.

16th December, 1929. Their Lordships' judgment was delivered by

Sir Binod Mitter.

SIR BINOD MITTER.—The following genealogical tables will show the relationship of the parties to this litigation, and will be helpful in understanding the disputes between them:—

A.

PIR BAKHSH.

Muhammad Bakhsh (original mortgagor), Plaintiff No. 1, now represented by his son Umar. — Sultan (original mortgagor)

(sons of Muhammad Bakhsh:) Muhammad Husain; Shera
(sons of Sultan:) Kala, Plaintiff No. 2.; Nawab (died childless).

Muhammad Husain — Rahmat Ali, Plaintiff No. 3.

Shera — Hakim Ali, Defendant No. 8.; Muhammad Ali, Plaintiff No. 4.

B.

MIRAN BAKHSH (the original mortgagee)

Allah Bakhsh, Defendant No. 1. — Nur Elahi, Defendant No. 2,

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C.

DARE KHAN

- Wali Muhammad (Purchaser from Miran Bakhsh) Defendant No. 3, Appellant No. 1.
- Ali Muhammad (Purchaser from Miran Bakhsh)
  - Muhammad Husain, Defendant No. 4, Appellant No. 2.
  - Hassan Muhammad, Defendant No. 5, Appellant No. 3.
- Muhammad Bakhsh (Purchaser from Miran Bakhsh)
  - Muhammad Yusaf, Defendant No. 6, Appellant No. 4.
  - Muhammad Yunis, Defendant No. 7, Appellant No. 5.

The facts out of which this present appeal arises, are shortly as follows:—

By a registered deed, dated the 15th of March, 1880, and executed by Sultan and Mohammad Bakhsh, certain lands and wells were mortgaged to the aforesaid Chaudhri Miran Bakhsh in consideration of the sum of Rs. 1,200. The mortgagees went into possession, and it was a term of the mortgage that the mortgagors would not be competent to redeem the mortgaged premises until after 20 years from the date of the mortgage.

About the year 1891 Miran Bakhsh transferred his interest to Wali Mohammad, Ali Mohammad, and Mohammad Bakhsh, sons of Dare Khan, all named in the above-named genealogical tables, and they went into possession after their purchase.

It is alleged by the defendants that the mortgagors Mohammad Bakhsh and Sultan sold their equity of redemption about the year 1891 or 1892 to the defendant No. 3, and the said Ali Mohammad and Mohammad Bakhsh for Rs. 1,200 and Miran Bakhsh released the mortgaged premises to them.

The plaintiffs, who are the mortgagor Mohammad Bakhsh and the descendants of Sultan, denied such sale, and instituted the present suit in the Court of the Subordinate Judge of Sheikhpura on the 17th November, 1920, against the sons of Miran Bakhsh and the present appellants for the redemption of the mortgaged premises. The only point discussed before the Board is whether the appellants have proved the sale.

The learned Subordinate Judge who tried the case held that the alleged sale had been proved. From his judgment and decree there was an appeal to the Additional District Judge of Sheikhpura (hereinafter referred to as the Appellate Court) who came

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to an opposite conclusion. There was a second appeal to the High Court of Judicature at Lahore, and they held that the question whether there had been a sale or not is a question of fact, and that it was not open to them to reconsider the evidence, as the Appellate Court had not contravened any of the provisions of section 100 of the Civil Procedure Code.

The first question, therefore, for their Lordships' consideration is whether the decision of the Appellate Court, namely, that there had been no sale, is a pure question of fact, for, if that is so, then its decision was final.

In the Punjab the sale might have been oral, as it was not governed by the Transfer of Property Act. The case for the appellants is that the sale was oral, and the mortgagors on such sale executed a receipt showing that Rs. 800 had been paid to them and Rs. 1,200 to Miran Bakhsh. The appellant Wali Mohammad gave evidence and called witnesses to prove the execution of the receipt, but both the trial and the Appellate Court held that the receipt had not been proved.

The appellants' case further was that on the sale there was mutation in favour of Wali Mohammad and his brothers, but that the mutation records had been burnt during the Gujranwala riots in the Punjab in 1919. They, however, relied on a number of entries in the record of rights prepared under the Punjab Land Revenue Act, being Act No. XVII of 1887, and they contended that these entries recognised the appellants or their predecessors as the owners of these properties, and that such entries duly made under S. 44 of the said Act are to be presumed to be correct as to the facts they record until the contrary is proved. The Appellate Court held that the mortgage being admitted, the *onus* was on the appellants to show that the mortgage had been extinguished by subsequent sale. Their Lordships agree with the High Court that the Appellate Court was right in its view on the question of *onus*.

In the view of the latter Court some of the entries in the record of rights were proved to be wrong, and after considering the evidence, both oral and documentary, and giving effect to the statutory presumption, it held that the *onus* upon the appellants had not been discharged. The first question, therefore, for consideration is whether its decision that the sale has not been proved is a question of fact or involves any question of law. It has been argued by the counsel for the appellants that the inference drawn from the various entries in the record of rights is a question of law, and that the Appellate Court drew a wrong

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inference from them. The respondents contended that these various entries are merely links in the chain of evidence to prove the sale and that the question whether there was a sale or not is a pure question of fact.

Section 100 of the present Code of Civil Procedure has replaced section 584 of the Civil Procedure Code of 1882. These sections are substantially the same in their terms and have often been considered by the Board and the different High Courts in India. No doubt questions of law and fact are often difficult to disentangle, but the following propositions are clearly established:—

(1) There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross the error may seem to be. (See *Musummat Durga Choudrain* v. *Jawahir Singh Choudhri.*[1])

(2) The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. (*Nafar* v. *Shukur.*[2])

(3) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights but were really historical materials, have to be construed for the purpose of deciding the question. (See *Midnapur Zamindary Co.* v. *Uma Charan Mandal.*[3])

In the last cited case the question the Board had to decide was the date of the origin of an under-tenure. The first Appellate Court fixed the date from the contents of some documents. No oral evidence had been called in this case.

(4) A second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first Appellate Court had made a mistake as to its meaning. (See *Nowbutt Singh* v. *Chutter Dharee Singh.*[4]) The judgment in this case was delivered by Sir Richard Couch, under section 372 of the Civil Procedure Code of 1859, but it has repeatedly been followed in decisions under the Civil Procedure Codes of 1882 and 1908.

Great reliance was placed by the appellants' counsel on *Dhanna Mal* v. *Moti Sagar,*[5] but there the tenancy was

1. (1890) L.R. 17 I.A. 122 at 127: I.L.R. 18 C. 23 (P.C.).
2. (1918) L.R. 45 I.A. 183 at 187: I.L.R. 46 C. 189 (P.C.).
3. (1923) 29 C.W.N. 131: 45 M.L.J. 663 (P.C.).
4. (1873) 19 W.R. 222.
5. (1927) L.R. 54 I.A. 178: I.L.R. 8 Lah. 573: 52 M.L.J. 663 (P.C.).

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admitted and the question was whether it was permanent or not, and the solution of it depended upon what was the legal inference to be drawn from proved facts, or, in other words, the question was what was the legal effect of proved facts. The question whether a statutory presumption is rebutted by the rest of the evidence, as is the case here, is always a question of fact. (See *Kumeda Prosunna Bhuiya* v. *The Secretary of State for India in Council.*[6])

This case was recently approved by the Board in the case of *Midnapur Zamindary Co., Ltd.* v. *The Secretary of State for India.*[7]

Their Lordships are of opinion that whether there was a sale or not is a question of the fact. In this case both parties led evidence oral and documentary. The Appellate Court, as has already been stated, held that many of the entries, notwithstanding the presumption under section 44, were incorrect. The entries relied on by the appellants were not the foundations of their title but were mere items of evidence adduced by them to prove the sale. The only question as regards the entries is their evidentiary value on the fact in issue, *viz.* the sale. Their Lordships, therefore, have no hesitation in holding that the finding of the Appellate Court that there was no sale is final, and that the judgment of the High Court is right. The appeal should, therefore, be dismissed with costs and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Ranken Ford & Chester.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD ATKIN, LORD THANKERTON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Bai Mangu and others .. *Appellants**

v.

The Bharatkhand Cotton Mills Co., Ltd. .. *Respondents.*

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Company—Shares in—Allotment of—Executory contract valid for, before allotment—Conditions—Preference shares—Allotment to creditors of, for their claims—Offer of—Meaning, true of—Concluded contract for—Proof of.

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*P.C. Appeal No. 118 of 1927. 28th January, 1930.

6. (1914) 19 C.W.N. 1017. 7. (1929) L.R. 56 I.A. 388.

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There may be a valid executory contract for the allotment of shares in a Company constituted by offer and communicated by acceptance before allotment is made. If, however, the only facts are that there is application for shares to a Company, and nothing further is done by the Company but allotment, there is no concluded contract until the allotment is communicated to the applicant. The offer of a Company to allot preference shares to creditors for their claims can only mean for their just claims, not for what they may put forward as their claims.

Held, on the evidence, that there was a concluded contract between *K* and the respondent Company to take preference shares for the amount which he should be entitled to claim.

Consolidated appeal No. 118 of 1927 from three decrees of the High Court, Bombay (Marten and Fawcett, JJ.), dated the 8th October, 1924, reversing three decrees of the First Class Subordinate Judge of Ahmedabad, dated the 10th July, 1922 and dismissing three suits which he had decreed.

The material facts of the case, for purposes of the present report, are sufficiently fully stated in their Lordships' judgment.

The appellants-plaintiffs claimed from the respondent Company preference shares asserting that the Company had agreed in the year 1912 to issue to them so many preference shares as would at their par value satisfy their claims under deposit receipts of the Company, dated the 31st October, 1911, and issued to the appellants—in order of their appeals—for Rs. 50,000, Rs. 75,812-8-0 and Rs. 11,605-2-8, respectively.

The High Court (differing from the Trial Judge) held that the appellants had not proved any agreement by the Company to issue to them preference shares in respect of the said deposit receipts, Mr. Justice Fawcett concluding his judgment in the following words:—

"I do not think that the resolution of 20th April, 1912, could confer any right on Kevaldas (the plaintiff) to get such (*i.e.,* preference) shares, and the circumstances were not such as to bind the Company to issue preference shares to him to the extent of his just dues as a creditor. There would really only be a contract to do so when the Company had actually allotted him the shares and communicated this to him. As laid down in *Gunn's case,*[1] if a man applies for shares in a Company, and the directors allot them to him, and after the allotment, but before it is communicated to the applicant, he withdraws the application, there is no complete contract and he is not bound to accept them. Similarly here, there was, I think, no contract binding the Company to give the preference shares until at any rate the agents had actually allotted them under the authority conferred on them by the resolution. I think the minutes show that the question put to Kevaldas was only whether he would be willing to take preference shares, if allotted to him, and that there was no definite undertaking to allot such shares."

Against the judgment of the High Court dismissing their suits, the plaintiffs preferred the present appeal to His Majesty in Council.

1. (1867) 3 Ch. App. 40.

De Gruyther, K.C., Raikes, K.C. and *G. D. McNair* for appellants.

Upjohn, K.C. and *Parikh* for respondents.

28th January, 1930. Their Lordships' judgment was delivered by

LORD ATKIN.—This is an appeal from a decree of the High Court of Judicature at Bombay reversing a decree of the Subordinate Judge of Ahmedabad and dismissing with costs a suit brought by the appellants against the respondent Company. There has been much litigation between the parties and others which is relevant to the issues that arise in these suits. The course of the litigation has been carefully and adequately set forth in the judgment appealed from of the present Chief Justice of Bombay, who has appended to his judgment a valuable table of the relevant dates and decrees. The facts have also been fully set out in the judgments below. In the view taken by their Lordships it becomes unnecessary to discuss many of the matters that were in contest in the Courts below and before the Board, and their Lordships will proceed to state only so much of the facts as is essential to explain the reason for their decision. The respondent Company, the Bharatkhand Cotton Mills Company, Limited, was formed in 1896. The appellant Kevaldas had from the beginning a substantial interest in it. He was chairman and manager, and his firm, who for this purpose may be treated as synonymous with himself, was at all material times until the end of 1911 secretary, treasurer and agent of the Company. In that capacity a running account existed between Kevaldas and the Company, running into large figures, in which Kevaldas appears at sometimes debtor, at others creditors of the Company. In the year 1905 Kevaldas started on his own behalf a weaving factory on land which he took on lease. The weaving factory was run in close co-operation with the spinning mills, which were the business of the Company, and no doubt might legitimately serve the Company's interests. In January, 1909, however, one of the shareholders, suing for himself and the other shareholders, commenced a suit against Kevaldas for a declaration that the weaving factory was built out of the Company's money and was the property of the Company, and for an account of the profits made by Kevaldas out of the Company's money used by him. The claim to the factory was not persisted in, but on January 26, 1910, a preliminary decree was made declaring that Kevaldas was liable for profits made by the use of the Company's money and directing the necessary

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accounts and inquiries. In April, 1914, the Subordinate Judge, on consideration of the report of the Commissioner who took the account, dismissed the suit, but in August, 1916, the Company's appeal was allowed by the High Court, and a decree made in favour of the Company for Rs. 1,46,453, with interest at 9 per cent. as from May 15, 1910. This money decree was executed against Kevaldas's property between 1916 and 1920, and a sum of Rs. 47,677 was realised. In June, 1923, this Board dismissed an appeal by Kevaldas against the decree*.

Meantime the circumstances had arisen out of which the present claim by Kevaldas arises. In May, 1910, the Company confirmed a special resolution for the purchase of the weaving factory from Kevaldas for a net sum of Rs. 3,51,000, "to be brought to account in his name," and took over the factory as from May 15, 1910. The validity of this sale was challenged in subsequent litigation between Kevaldas and the Company, but without success, and the debt so created for the purchase price must be taken to be established. The result of bringing it into account with Kevaldas, together with a further sum of Rs. 87,975, which was credited as the price of stores, etc., taken over, was to convert a debit of nearly a lac and a half into a credit to Kevaldas of nearly 3 lacs. This sum was reduced by drawings until in September, 1911, it stood at something over a lac. On September 1 Kevaldas issued a deposit receipt in the name of the Company to himself, which later he endorsed to his wife, and for which a few days later he substituted a deposit receipt in the name of his wife. The account, however, was still running, and on October 31, 1911, he cancelled the existing deposit receipt and issued three deposit receipts in varying amounts to his wife and his daughter-in-law and himself amounting in all to Rs. 1,37,417, which was the balance then standing to his credit. It is not disputed that the wife and daughter-in-law were nominees for Kevaldas, and that the rights of the parties must be determined as though Kevaldas alone had held the receipts. In August, 1911, the Mills had been destroyed by fire, and later in the year Kevaldas decided to retire from the position of secretary and agent, a position which he ceased to hold on December 31, 1911.

The point of time is now reached at which the alleged cause of action in this suit arose. The Company, being in some financial difficulty, determined to reduce its capital and to make an

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See 28 C.W.N. 930.—K.J.R.

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issue of preference shares. Of the preference shares some were to be allotted to creditors in satisfaction of their debts; the balance was to be available for the purpose of raising further working capital. Kevaldas alleged that he agreed with the Company to have preference shares allotted to him to the nominal value of the debt owing by the Company to him and his nominees, represented by the amount of the deposit receipts, with accrued interest and some addition to the current account, which was incurred between October 31, 1911, and the actual date of his resignation. In the present suit he claims specific performance of the agreement or, alternatively, damages for non-delivery. As the Company attained considerable prosperity during the war years and after, the preference shares, with arrears of dividend, represent a value much greater than the original debt. The Company deny that there ever was a concluded agreement to allot shares to Kevaldas; but if there were, they say that the result of the shareholders' action brought in 1909 was to show that there never was in fact any balance due in 1911, and therefore the deposit receipts must be taken to be given without consideration; or, in the alternative, they say that the shares were only to be given for the ultimate nett indebtedness of the Company on all accounts; and as against the debt due on the deposit receipts there must be set off the balance of the amount of Rs. 146,453-0-2 and interest due on the decree of August, 1916. The Subordinate Judge found in favour of Kevaldas that there was a binding agreement to allot preference shares in satisfaction of the debt substantially represented by the deposit receipts, and decreed specific performance accordingly.

The learned Judges of the High Court found that the result of the decision of the High Court in the shareholders' action was to negative the existence of any debt which could support the deposit receipts; for the amounts found due to the Company should have been credited in the current account, and would have resulted in a debit balance to Kevaldas instead of a credit. This view disposed of the action, but they proceeded to express their opinion that there was no concluded contract. The opinion of the Chief Justice was that there was no consideration for it; a view which does not dispose of an alleged contract to allot shares for such an amount as should be found to be due in the future. Mr. Justice Fawcett held that there could be no concluded contract until after allotment in fact and communication of the allotment to the proposed shareholder. Their

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Lordships cannot uphold this view of the law. There may be a valid executory contract for the allotment of shares constituted by offer and communicated acceptance before allotment is made. If, however, the only facts are that there is application for shares to a Company, and nothing further is done by the Company but allotment, there is no concluded contract until the allotment is communicated to the applicant. These are the facts in *Gunn's case*[1] relied on by the learned Judge; but they are not the facts alleged in this case.

There is no very clear evidence of the contract. It consists of the minutes of meetings of the shareholders of the Company and of the subsequent conduct of the parties. The material meeting is of April 20, 1912. A resolution was proposed that: "The secretaries, treasurers and agents are hereby authorised to allot at the par value of the shares to Kevaldas and to other creditors of this Company for their claims so many of the preference shares as would be sufficient to satisfy their claims." After certain amendments were moved, the minute records: "Mr. Kevaldas Tribhovandas, on being asked, said that he agrees to take preference shares in respect of moneys which may be found due on making account of the moneys which may be claimable in his own name, in the name of his wife, and in the name of his son, making up the amount by calculating interest at 6 per cent." Later, on a submission of May 11, 1912, Kevaldas went to arbitration with Mulchand, his then successor in the office of secretary and agent, as to the right to have preference shares, and an award was made that Kevaldas, his wife and daughter-in-law were bound to take preference shares "for the amount which may be due to them by the Company." There may be some doubt whether this award, to which the Company were not in terms a party, was in itself evidence on the issue; but Kevaldas subsequently applied to the Court to have the award filed in Court, and thereby clearly made it evidence against him. As far as the Company was concerned, they retained preference shares to meet any possible claim by Kevaldas, and kept dividends in reserve accordingly. The directors' report for the year ending December 31, 1919, shows a sum of Rs. 9,000 "to be kept credited for payment of dividend and shares, which would on a rough estimate come to this amount, till the disposal of that suit; that is pending against the family of Kevaldas and others in the event of its being held that shares should be given to them." In the present suit the Company,

1. (1867) L.R. Ch. App. 40.

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pleading before the decree of August 22, 1916, had been given in their favour, alleged in para. 30 of their written statement that though nothing was due to the plaintiff, "yet if on accounts being taken (if any amount be found due to him) we were and are always prepared to give him preference shares for the amounts which may justly be found due to him, and to accept such preference shares he has given his consent." It appears to their Lordships, on consideration of the whole of the minutes, correspondence and other facts, including those above referred to, that there was a concluded contract between Kevaldas and the Company to take preference shares for the amount which he should be entitled to claim.

But in ascertaining what that amount is their Lordships have no doubt that the balance of the sum due on the decree must be taken into calculation. The offer of the Company to allot preference shares to creditors for their claims can only mean for their just claims, not for what they may put forward as their claims. It appears to their Lordships to have been accepted in this sense by Kevaldas. There was at the time of the offer the suit pending by the shareholder, which claimed that Kevaldas was indebted to the Company, and though at the time a majority of the shareholders were hostile to the suit proceeding, they were powerless to stop it, and, in fact, it continued. The present suit was brought in 1914, and it appears to their Lordships that the defendants were clearly entitled to raise the question what the true amount of the claim was, and though when they pleaded originally the shareholders' suit had been dismissed, yet after the appeal was allowed in 1916 and a decree for Rs. 1,46,453 given, they were entitled by amendment to bring that sum into the account, and their Lordships entirely approve of the decision of the High Court to admit the amendment. In this view of the case it is immaterial to decide whether there have been in existence two debts, one due by Kevaldas to the Company, and another due by the Company to Kevaldas, or only one, the balance of a current account in which the items relied on appear on either side. The substance of the matter is that the Company only agreed to satisfy the creditors' just claim: such a claim as he might have proved in a liquidation, and that in the present case Kevaldas's claim can only be ascertained by deducting from the amount owed to him by the Company the amount he owes the Company. Inasmuch as the balance is in favour of the Company the suit fails.

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Their Lordships ascertained from counsel for the Company that they were prepared to accept this view of the case, which their Lordships had formed on the conclusion of the appellants' arguments. It became unnecessary, therefore, for their Lordships to form a final opinion upon the view expressed by the learned Judges of the High Court that the Company were entitled to treat the items making up the amount for which the decree was obtained as items which should have been included in the current account between Kevaldas and the Company, so that the credit balance for which the deposit receipts were given disappeared, and counsel of the Company were not asked to support this finding. Their Lordships content themselves with saying that, as at present advised, they find it difficult to see how the Company can consistently use the items to destroy *contra* credits, and at the same time obtain a money decree for the full amount of the items and proceed to execute it accordingly. If the case had turned on this they would have required further argument.

A further complication arose in the suit, which might well have disposed of the plaintiffs' claim at an early stage. It appears that, on April 12, 1912, Kevaldas mortgaged by assignment the three deposit receipts in question to one Tulsidas to secure a pre-existing debt, and notice of the assignment was duly given to the Company. Tulsidas was a party to the present suit and obtained from the Subordinate Judge a decree for the full cash amount due on the receipts. On appeal the High Court intimated that Tulsidas took subject to equities, and thereupon by consent of all parties a consent decree was made which, as amended on March 2, 1922, provided that the Company paid Tulsidas the balance due to him, Rs. 86,444, with interest at 7 per cent. from October 31, 1920. This payment was subject to the right of the Company to be credited with the amount against any sum that should be found to be due to Kevaldas on the deposit receipts, and was to be without prejudice to all other contentions which might be raised by the parties. The assignment to Tulsidas would appear to preclude any right of Kevaldas to put the deposit receipts in suit in 1914, and if the payment by the Company to Tulsidas was on the footing of an assignment by Tulsidas of his rights on the deposit receipts, Kevaldas would be in difficulty in asserting any claim. The compromise is inartificially stated; but it appears to their Lordships that the true view is that, as far as the rights of the parties in this suit are concerned, Tulsidas disappears as though there never had been an assignment to or by him, and that Kevaldas acknow-

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ledges that the Company are entitled to recover from him by deduction from the deposit receipts if possible, if not, by any other way the amount which they paid to Tulsidas under the compromise. In the view taken by their Lordships this sum falls to be deducted in the first instance from the sum due to the deposit receipts.

On the conclusion of the arguments for the appellants their Lordships gave the parties an opportunity of agreeing the figures if possible on the footing of the view of the case expressed above. Unfortunately, agreement as to the exact amount could not be reached on the information available in England. All parties, however, have assented to the convenient procedure adopted by the Court of Appeal of expressing, in one decree the financial result of the relations between the parties including decrees now standing against either party. Their Lordships are unable to ascertain the precise figures, a task which will devolve upon the Courts in India. The decree of the High Court requires to be varied, but the appellant substantially fails, and must pay the costs of the appeal. An account must be taken to ascertain how much should be credited to Kevaldas in respect of the dividends claimed to be deducted by the respondents in the execution schedule, the dividends to be credited as they fall due with interest, if any interest is payable under the articles. On the other hand the Company are entitled to be credited with the payment to Tulsidas with interest in accordance with the consent decree of March 2, 1922. They are also entitled to their decree, dated August 22, 1916, for Rs. 1,46,463, with interest from May 15, 1910, less the sums realised on execution which must be ascertained and capital sums and interest adjusted accordingly. It is desirable that the balance so ascertained should be the only sum for which execution should be permitted under the decree of August, 22, 1916: and the Court will determine the form of decree by entering up satisfaction or otherwise which will best achieve this result. There should be a stay of execution of the decree of August 22, 1916, until any further order which the Court in its discretion may make. In the result the decree of October 8, 1924, is varied by the omission of paragraphs 2 and 5 otherwise it will stand. The case is remitted to the High Court to be dealt with in accordance with their Lordships' judgment. Their Lordships will humbly advise His Majesty occordingly.

Solicitors for appellants: *Stanley Johnson & Allen.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Decree of High Court varied and case remitted.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD TOMLIN, LORD THANKERTON AND LORD RUSSELL OF KILLOWEN.

Ahidhar Ghosh .. *Appellant**

v.

The Secretary of State for India in Council .. *Respondent.*

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Land Acquisition Act (I of 1894), *S.* 23—*Market value of land acquired—High Court's decision as to, reversing Special Judge and restoring Collector—Privy Council's interference, with—Conditions.*

In an appeal under the Land Acquisition Act from the decision of the High Court which reversed the judgment of the Special Land Acquisition Judge and affirmed the award of the Collector, the appellant was unable to make out that there was any wrong application of principle by the High Court in rejecting the evidence of an expert on which the Special Judge chose to act, or that any important point in the evidence was overlooked or misapplied. Following the principles enunciated in *Narsingh Das* v. *Secretary of State*[1] as governing their Lordships' Board in dealing with questions of that kind their Lordships refused to disturb the conclusion of the High Court.

Appeal No. 26 of 1929 from a decree of the High Court, Calcutta, dated the 23rd May, 1927, which varied a decree which had been made by the Special Land Acquisition Judge, 24-Perganas, on the 18th March, 1925, on a reference made under section 18 of the Land Acquisition Act of 1894.

The Special Judge having enhanced the award made by the Land Acquisition Collector, the Secretary of State for India appealed to the High Court. The Judge's finding as to the market value was based entirely on the evidence of an expert witness, Mr. Johnstone. The High Court having rejected this evidence upheld the award of the Collector, concluding their judgment as follows:

"There is only one other piece of evidence in the case and it is important. Under section 557 of the Calcutta Municipal Act (Act III of 1899) the market value of the land for the purposes of acquisition shall, until the contrary is shown, be presumed to be twenty-five times the annual value of the property as entered in the assessment book. In the absence of any evidence in the case it seems to us that this would be a safe guide in ascertaining the value."

From the said decree of the High Court the present appeal was preferred to His Majesty in Council.

De Gruyther, K.C. and *Dube* for appellant.

Dunne, K.C. and *Wallach* for respondent.

De Gruyther, K.C.—The evidence produced on behalf of the appellant established that he was entitled to the amount

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*P.C. Appeal No. 26 of 1929. 1st May, 1930.

1. (1924) L.R. 52 I.A. 133: I.L.R. 6 L. 69: 48 M.L.J. 386 (P.C.).

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awarded by the Special Land Acquisition Judge. The presumption under the Calcutta Municipal Act had been misapplied by the High Court. The evidence of our expert witness was sufficient to rebut the presumption.

[LORD TOMLIN.—The only question involved in this appeal is one of valuation of land, and all necessary principles applicable were considered and applied by the High Court. Under these circumstances the Board does not usually interfere: *Narsinghi Das* v. *Secretary of State*.[1]]

Counsel for the respondent were not called upon.

1st May, 1930. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—This is an appeal from a judgment and decree, dated the 23rd May, 1927, of the High Court of Judicature at Fort William in Bengal, by which a judgment and decree, dated the 18th March, 1925, of the Special Land Acquisition Judge at Alipur was varied.

The nature of the case is this: The Municipality of Calcutta required certain land in Michael Dutt Street in Calcutta, and accordingly invoked the machinery of the Land Acquisition Act, 1894, for the purpose of securing the property. Under that Act anybody seeking to acquire land sets the Government Collector in motion by means of a number of declarations and notifications which need not be specifically referred to. Under section 11 of the Act, on a day which the Collector fixes, the Collector proceeds to inquire into the objections, if any, raised by the persons interested. He inquires into the value of the land and the nature of the interests therein. It is his duty to make an award as to the true area of the land, the compensation which in his opinion should be allowed for the land, and the apportionment of the compensation among the persons interested. Section 18 provides:

"Any person interested who has not accepted the award may by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable or the apportionment of the compensation among the persons interested."

Under sub-section (2) of the same section the application must state the grounds on which objection to the award is taken. Then the matter goes to the Special Land Acquisition Judge, and under section 23, sub-section (1), in determining the amount

1. (1924) L.R. 52 I.A. 133: I.L.R. 6 L. 69: 48 M.L.J. 386 (P.C.).

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of compensation to be awarded for the land acquired under the Act the Court has to take into consideration the market value of the land at the relevant date.

Section 25, sub-section (1) provides:

"When the applicant has made a claim to compensation pursuant to any notice given under section 9 the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under section 11."

It is necessary also to refer to the Calcutta Municipal Act of 1899. Section 557 of that Act provides:

"Any land or buildings which any municipal authority is authorized by this Act to acquire may be acquired under the provisions of the Land Acquisition Act, 1894, and for that purpose the said Act shall be subject to the following amendments."

The amendments include one [sub-section (*d*)] to this effect—.

"The market value of the land or building shall until the contrary is shown be presumed for the purposes of the said clause first of sub-section (1) of section 23 '(*i.e.*, of the Land Acquisition Act, 1894),' to be twenty-five times the annual value of the property as entered in the assessment book prescribed by this Act."

Under the Calcutta Municipal Act provision is made for the maintenance of a book in which the assessments of lands and buildings are entered, and section 151 of the Act defines how the annual value of the buildings and lands is to be ascertained.

What happened was this: The Collector in due course made an award, and the amount of his award was Rs. 69,778 for the land. There was something else awarded in respect of the structures. The appellant, who was interested in the land, was dissatisfied with the award, and under section 18 he claimed a reference to the Special Land Acquisition Judge. The matter accordingly came before that Judge, and evidence was called before him, and he ultimately awarded Rs. 81,773. In making that award he proceeded upon the footing of accepting the evidence of a Mr. Johnstone, a civil engineer, who was called as an expert by the persons interested in the land, and who gave evidence as to the value of the land. The Special Land Acquisition Judge accepted Mr. Johnstone's figures with one variation, namely, an increase in the amount of certain deductions by substituting for a 6 per cent. basis a 10 per cent. basis.

An appeal was taken to the High Court, and the High Court reversed the judgment of the Special Land Acquisition Judge and affirmed the award of the Collector. In doing that they proceeded upon the footing (1) that they were not prepared to

accept the evidence of Mr. Johnstone, and that the presumption which arises under section 557, sub-section (*d*), of the Calcutta Municipal Act, 1899, therefore operated; and (2) that though the amount awarded by the Collector exceeded the amount calculated in accordance with the presumption his award must stand having regard to section 25, sub-section (1) of the Land Acquisition Act, 1894.

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The principles which govern their Lordships' Board in dealing with questions of this kind were stated by Lord Buckmaster in the case of *Narsingh Das* v. *Secretary of State for India in Council.*[1] In the judgment this passage occurs at page 135:—

"The matter, therefore, must be considered and determined in the same manner as if it were a judgment from a decree in an ordinary suit, but it has been repeatedly laid down by the Board that in such cases they will not interfere with judgments of the Courts in India as to matters involving valuation of property and similar questions where knowledge of the circumstances and of the district may have an important bearing on the conclusion reached, unless there is something to show, not merely that, on the balance of evidence, it would be possible to reach a different conclusion, but that the judgment cannot be supported as it stands, either by reason of a wrong application of principle, or because some important point in the evidence has been overlooked or misapplied."

An examination of the judgments of the High Court shows that they had before them in regard to value the evidence of Mr. Johnstone and no other expert evidence at all, that they considered and criticised Mr. Johnstone's evidence, and that in the end they came to the conclusion that they could not accept his view as to value. Further, there being no evidence of value other than Mr. Johnstone's evidence, they took the view that in those circumstances the presumption must prevail.

Their Lordships are of opinion that it has not been made out that there was any wrong application of principle by the High Court in the rejection of Mr. Johnstone's evidence or that any important point in the evidence was overlooked or misapplied. In these circumstances their Lordships are of opinion that they are not in a position to disturb the conclusion at which the High Court arrived. The appeal must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Watkins & Hunter.*

Solicitors for respondent: *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

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1. (1924) L.R. 52 I.A. 133: I.L.R. 6 L. 69: 48 M.L.J. 386 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Sree Venugopala Rice Mill represented by Mallidi Nagayya and others .. *Appellants* (*Defts.* 1, 3, 5, *etc.*)

v.

Rajah of Pithapuram and others .. *Respondents* (*Plff. and Defts.* 2, 4 *and* 38).

Venugopala Rice Mill *v.* Rajah of Pithapuram.

Madras Estates Land Act (*I of* 1908), *Ss.* 3 (11), 3 (15), *and* 56—*Sale of a portion of ryoti land—Contract between land-holder and the purchaser that the portion of land should be used for building purposes instead of agricultural purposes in consideration of annual payments—Validity—Annual payments, if rent—Purchaser, if a ryot—Suit for specific performance of the contract—Jurisdiction of Civil Court.*

There is nothing in the Estates Land Act to prevent the land-holder and the purchaser of a portion of the ryoti land in his estate from entering into a contract with each other that that land in future should be held or used not for agricultural purposes but for building purposes. The consideration for the landholder agreeing to the same may be either a lump payment made to him or annual payments. Such annual payments are not "rent" within the meaning of S. 3 (11) of the Estates Land Act nor the persons agreeing to pay them ryots. A suit for specific performance of such a contract is not a suit to enforce acceptance of patta by a ryot within the meaning of S. 56 of the Estates Land Act and is, therefore, maintainable in the ordinary Civil Court.

Ramachandra Mardaraja Deo v. *Dukko Podhano,* (1915) 31 I.C. 852, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A.S. No. 21 of 1925 (A.S. No. 240 of 1924, District Court, Godavari), preferred against the decree of the Court of the Principal District Munsif of Rajahmundry in O.S. No. 569 of 1923 (O.S. No. 141 of 1922, Principal District Munsif's Court, Ramachandrapur) and Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Rajahmundry, dated 19th March, 1926 and passed in Small Cause Suit No. 14 of 1926.

P. Somasundaram for appellants.

The Advocate-General (*A. Krishnaswami Aiyar*) for 1st respondent.

The Court delivered the following

Wallace, J.

JUDGMENTS: *Wallace, J.*—The facts necessary for the disposal of this appeal are: The defendants are the proprietors of a rice mill. They purchased for the purpose of erecting and working a mill 3·26 acres out of S. No. 179 in the suit

*S.A. No. 594 of 1926. and C.R.P. No. 878 of 1926. 13th December, 1929.

village which lies within the estate of the Zamindar of Pithapuram, who is the plaintiff. The defendants' vendor was the ryot who held S. No. 189 on patta from the Zamindar. When the Zamindar's *thanedar* informed the defendants that buildings should not be erected on ryoti land, the defendants petitioned the Zamindar and came to an agreement with him that they should be left undisturbed promising to pay him three times the ordinary cist. The Zamindar accordingly ordered his officials to sub-divide the 3·26 acres from the main holding and have that registered as a separate holding in the names of the defendants, and directed that a draft patta and a muchilika should be prepared. When the muchilika was offered to the defendants, they refused to accept it, on the ground, that the Zamindar could not charge them more than the ordinary cist. The plaintiff has accordingly filed this suit for specific performance of the agreement. Both the Lower Courts have decreed the suit and the defendants appeal.

Clearly on the equities they have no case, but they stand on the technical ground that this suit is, in effect, one to enforce a patta and, therefore, cannot be brought in a Civil Court. The answer to this contention seems to me to be that the defendants are not "ryots" within the definition of that term in the Madras Estates Land Act. They are not persons who ever held or are now holding this ryoti land under the plaintiff for the purpose of agriculture. They never wanted so to hold it. They did not buy the land for that purpose. Their avowed purpose in purchasing the land was for erecting the mill upon it, and their arrangement with the plaintiff was that they should be allowed to retain it for building purposes and they have in fact built upon it. In these circumstances it seems to me impossible to hold that the defendants are ryots within the definition in the Act. Since they are not ryots, whatever recognition the Zamindar has made in the matter of consenting to the sub-division of the land and to its being held under him for rent is not a recognition by him of the defendants as his ryots. It does not advance the case of the defendants that they purchased the land from a ryot. Whether the Zamindar chooses to eject that ryot under section 151 because he has impaired the value of his holding for agricultural purposes by sale of 3·26 acres of it to the defendants is a matter entirely between the plaintiff and that ryot and is no concern of the defendants. For a similar reason there is no question here of any enhancement of a ryot's rent. The rent of that ryot who holds patta for the land has not been enhanced,

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and the rent claimed from the defendants is therefore not an enhancement of the ryot's rent. The rent payable by the defendants is the matter of a separate contract between them and the Zamindar, and it is not "rent" under the provisions of the Estates Land Act. See *Ramachandra Mardaraja Deo* v. *Dukko Padhano*[1]. The defendants, then, not being ryots, section 55 of the Estates Land Act, which is the section enabling a suit to be brought to enforce a patta on a ryot, has no application. There is no reason, therefore, for holding that the Civil Court has no jurisdiction to enforce the specific performance of the plaint agreement, which is in essence merely a contract between the landlord and those who have bought out the original occupancy-holders. I, therefore, see no reason to interfere with the decree of the Lower Appellate Court and dismiss this appeal with costs.

C.R.P. No. 878 of 1926 follows and is dismissed with costs.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—I agree. The defendants (Sree Venugopala Rice Mill, Pandalapaka, and the shareholders thereof) are the appellants in this second appeal. S. No. 179 was Jeroyati land under wet cultivation, of the extent of 56 acres, paying rent at a particular rate per acre to the plaintiff, the Rajah of Pithapuram. The defendants purchased 3 acres from the ryot who owned S. No. 179 and wanted to use the same for non-agricultural purposes by constructing buildings thereon for use as a rice mill. When the defendants proceeded to erect buildings on the 3 acres purchased by them in 1916, the plaintiff's officials obstructed the defendants from proceeding with the building on the ground that the defendants were not entitled to use the 3 acres of land, which were actually under wet cultivation, for building purposes unconnected with the agricultural use of the land. The defendants, thereupon, petitioned the plaintiff for permission to use the land for non-agricultural purposes and for using the same for building purposes, offering to pay three times the rent that was being paid in respect of the land. The plaintiff agreed to the said offer and directed proper house-site patta and muchilika to be executed by both parties. The buildings having been evidently completed in the meantime, the defendants wanted to back out of the agreement; they denied to do anything further in the matter. The plaintiff filed the original suit in the Court of the District Munsif of Rajahmundry for specific performance of the agreement between the parties. The defendants pleaded coercion,

1. (1915) 31 I.C. 852.

misrepresentation, etc.; and both the Lower Courts found against the said contentions of the defendants. The defendants also pleaded that the suit was for enhancement of rent and that the Civil Courts had no jurisdiction to entertain the suit. Both the Lower Courts disallowed these contentions also, and decreed the suit in plaintiff's favour. The defendants have preferred the present second appeal.

Mr. P. Somasundaram, the learned Advocate who appeared for the appellants, argued that the Civil Courts had no jurisdiction to entertain the suit, that the plaintiff's remedy, if any, was only to take ejectment proceedings under section 151 of the Estates Land Act, if the use of 3 acres out of 56 acres for building purposes be considered to be "materially impairing the value of the holding for agricultural purposes," and further that the suit was really for enhancement of rent. He referred to section 189 of the Estates Land Act and also to section 11 as regards the right of the ryot to use the land "in any manner which does not materially impair the value of the holding or render it unfit for agricultural purposes;" he relied also on section 27 as regards the rate of rent payable by the ryot. He also referred to section 56, under which the landholder should proceed in the Revenue Courts to compel the ryot to accept patta and to execute muchilika. He also argued that in spite of buildings being raised on the land, the land remained "cultivable" land, and that the landholder was only entitled to recover the mamool rent payable in respect of the lands, and that, if the landholder wanted "enhancement of rent," he was bound to proceed under the provisions of Chapter III of the Estates Land Act.

On behalf of the respondent the learned Advocate-General argued that the three acres in question were purchased by the defendants under Exhibits II and II(*a*) from the original ryots who owned 56 acres in Survey No. 179, and under section 145 it was open to the landholder to sub-divide the original holding and recognise the 3 acres as a separate holding; that the effect of Exhibits A and B (the application by the defendants and the order by the plaintiff) was to recognise the transfer and to treat the three acres as a separate holding; that no question of the applicability of section 151 of the Estates Land Act arose since the three acres in question should be deemed to be a separate holding after Exhibits A and B, and that the questions whether use of 3 out of 56 acres of wet land for building purposes was reasonable or not, and whether the same materially

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impaired the value of the holding for agricultural purposes or rendered it substantially unfit for such purposes, did not arise for consideration in this case. He contended that this was a case of the whole of the three acres of wet land included in a holding being built upon, in which case it could not be doubted that such user was not permissible on the part of the ryot, and the land-holder could have sued to eject the defendants under section 151 of the Act. The land-holder had valuable rigths in the land to prevent the use of wet land for building purposes by the defendants; while the defendants also were greatly benefited by being allowed to use these lands for building purposes. In the circumstances, both parties agreed that the land should not in future be held for agricultural purposes, and they agreed to convert the same into building sites and to have buildings erected thereon. He contended that there was nothing in the Estates Land Act which prevented the parties from agreeing to do so. The amount to be paid in future in respect of such land would not be "rent" within the definition of section 3 (11) of the Act, which defines "rent" as "whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture;"—so that, if the land is not held for purposes of agriculture, the payments could not be said to be "rent" within the meaning of the Estates Land Act. He similarly contended that the defendants could not be said to be "ryots" within the definition of section 3 (15), since they did not hold the land 'for the purpose of agriculture' on condition of paying to the landholder the rent which is legally due upon it. The amount to be paid by the defendants is not "rent," and the defendants themselves are not "ryots," after the plaintiff and the defendants agreed that the land should not be used for agricultural purposes but should be used for putting up buildings. He also argued that no provisions of the Estates Land Act prevented the parties from entering into such a contract or from fixing the amount payable by the one party to the other.

We think that the contentions raised by the appellants are not sustainable. We take the result of Exhibits A and B to be that the plaintiff recognised the defendants' purchase, and also agreed to treat the 3 acres in question as a separate holding. When both the parties agreed to utilise the land for building purposes, and not for agricultural purposes, the amount payable by the tenant under the contract could not be called "rent" within the meaning of the Estates Land Act; nor could the defend-

ants be said to be "ryots" within the meaning of the Act. It is only a suit to enforce acceptance of patta by a "ryot" that has to be instituted in Revenue Courts under section 56. For the same reason section 189 also does not apply. The amount not being "rent" within the definition of the Act, no question of "presumption as regards the rate of rent" arises under section 27; nor does any question of "enhancement of rent" arise within the meaning of Chapter III of the Act. We think that it was open to the parties to enter into the contract evidenced by Exhibits A and B. Valuable consideration moved from the landholder to the defendants, and we do not think that the legal objections raised on their behalf by their learned Advocate before us are tenable. The scheme of the Estates Land Act seems to be to protect persons who hold lands "for the purpose of agriculture". When the lands are not held for agricultural purposes, our attention has not been drawn to any provision of the Act which prevents parties from entering into any contract which it would otherwise be open to them to enter into. In *Meera Kasim Rowther* v. *Foulkes*[2] the Court held that a custom or contract entitling a ryot of agricultural land to erect buildings thereon is not opposed to the provisions of the Madras Estates Land Act, and can be enforced against the landlord, though such erections may impair the value of the holding for agricultural purposes. At page 434, the learned Judges—Sundara Aiyar and Sadasiva Aiyar, JJ., oberserved that

"Section 11 does not deprive the ryot of the benefit of a contract or usage which would entitle him to use it in a manner which might impair the value of the land for agricultural purposes. . . . It would, no doubt, probably have the effect, in case of relinquishment of the land by him, of depriving the landlord of the benefit of letting it out again for agricultural purposes. There is, however, nothing in the Act which renders such a contract or custom unenforceable against the landholder."

In *Ramachandra Mardaraja Deo* v. *Dukko Podhano*[1] Abdur Rahim and Spencer, JJ., held that money due for occupation of land let for the purpose of building houses is not "rent" within the meaning of section 3 of the Madras Estates Land Act, and that a suit to recover the same is cognizable by the Civil and not by the Revenue Court. The reasoning of the learned Judges in that case supports the view we take.

In our view there is nothing in the Estates Land Act to which our attention was drawn whch would prevent the parties from entering into a contract with each other that the land should in future be held or used not for agricultural purposes but for

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1. (1915) 31 I.C. 852.

2. (1912) I.L.R. 37 M. 432.

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building purposes. The consideration for the landlord agreeing to the same may be either a lump payment made to him or annual payments. Such annual payments are not "rent" within the meaning of the Estates Land Act, and a suit for specific performance of such a contract between the parties is not a "suit to enforce acceptance of patta" within the meaning of section 56 of the Estates Land Act. Such a suit is maintainable in the ordinary Civil Courts, and the objection as to jurisdiction accordingly fails. There is no question of "enhancement of rent" within the meaning of Chapter III of the Estates Land Act in the present suit, as contended for by the appellants.

We may state that we put the learned Advocate for the appellants the question as to what procedure should be followed by the landholder and the ryot in case both of them wanted to have such land held and used in future for building purposes, and, having regard to the benefit that would accrue to both the parties, the one agreed to make increased annual payments to the other. The learned Advocate, with his usual candour, answered that the Estates Land Act stood in the way and that such a contract would be invalid under the Act. We naturally were unwilling to accept such a result unless there be anything specific in the Estates Land Act which would necessitate the same. Our attention was not drawn to any such provision by the learned Advocate, and we are not ourselves aware of any.

It has been held that the amounts payable to landholders in respect of grazing fees, and the like, are not "rent" within the meaning of the Act, since the same are not paid for the use or occupation of land for the purpose of agriculture. In Bengal, it has been held that lands held for building, mining, or quarrying purposes are not lands held for agricultural purposes, and are not governed by the provisions of the Bengal Tenancy Act. See *Umrao Bibi* v. *Mahomed Rojabi*[3] and *Ranigunj Coal Association, Limited* v. *Judoonath Ghose.*[4] Sections 7 and 186 of the Estates Land Act refer to mining rights, and in cases, where the ryot has any right in the minerals, the Court is directed to award compensation for such right when the landholder acquires the land under section 186 for the opening and working of mines. Surely the landholder and the ryot, in cases where the ryot has a right in the minerals, could agree, as between themselves, as to the amount to be payable by the one to the other, in cases where minerals are to be worked. They are not bound to go to Court even if they could agree. This also

3. (1899) I.L.R. 27 C. 205. 4. (1892) I.L.R. 19 C. 489.

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indicates that it is open to the land-holder and the ryot to enter into contracts relating to the user of land for other than agricultural purposes. The result of accepting the appellant's contention would be to make it impossible for the land-holder and the ryot to agree to put up buildings unconnected with agricultural purposes on ryoti lands, wet or dry. In many districts, ryoti lands—mostly dry—are often purchased by persons for building houses thereon after paying money to the land-holder and to the ryot in possession. In the view presented by the appellants, the title of such purchasers of ryoti land from both the land-holder and the ryot, who build houses on such land, would be illusory since the land-holder could eject them under section 151 of the Estates Land Act, if—as is alleged—the contract be invalid in law.

It is clear that, unless we are driven to such a conclusion, we should avoid such a result; and we have not been referred to any provision of law which compels us to come to such a conclusion.

The general principle "once ryoti, always ryoti" is not violated in such cases, since the incidents of ryoti land would at once attach to such lands, should they subsequently, for any reason, again be held for agricultural purposes.

Chapter XIV of the Estates Land Act relating to restrictions on contracts between land-holders and ryots does not in any way invalidate such a contract as the one before the Court.

There is no merit in the appellants' contentions, nor in our view any law in their favour.

For the above reasons, I am of opinion that the second appeal fails, and I would dismiss it with costs.

C.R.P. No. 878 of 1926 is against the decree awarding the plaintiff the amounts due for faslis 1332, 1333 and 1334; the same is also dismissed with costs.

N.S. *Second appeal and Civil Revision Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Calcutta.]

PRESENT:—VISCOUNT DUNEDIN, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Kamini Kumar Basu Thakur and others .. *Appellants**

v.

Birendra Nath Basu Thakur and another .. *Respondents.*

P. C.

Kamini Kumar Basu Thakur *v.* Birendra Nath Basu Thakur.

Contract Act (IX of 1872), S. 23—Criminal prosecution—Dropping of—Consideration of—Award or agreement founded in part on—Evidence of—Invalidity of award or agreement in case of—Prosecution not in fact started—Effect—Commencement of prosecution—Issue of summons—Necessity—Award—Incomplete award—Invalidity of.

If it is an implied term of a reference to arbitration or of an ekrarnamah executed to give effect to the arbitrator's award that a complaint of a non-compoundable offence will not be further proceeded with, then the consideration of the reference or the ekrarnamah, as the case may be, is unlawful, and the award or the ekrarnamah is invalid, quite irrespective of the fact whether any prosecution in law had been started.

It is unlikely that an ekrarnamah will expressly state that a part of the consideration for it is an agreement to settle a criminal prosecution. It is enough in such cases if evidence is given from which the inference necessarily arises that part of the consideration is unlawful.

Held, on the evidence that it was an implied, though not an expressed, term, of an ekrarnamah that part of the consideration for it was that a criminal prosecution should not be further proceeded with.

Quaere, whether a prosecution only commences after a summons is issued, and whether before that stage is reached a complainant cannot be said to have dropped a prosecution under the Code.

An award which is incomplete because the parties whose presence was absolutely necessary to make it valid were never before the arbitrator is not valid.

Appeal No. 17 of 1928 from a judgment and decree of the High Court, Calcutta (Walmsley and B. B. Ghose, JJ.), dated the 28th May, 1925, reversing a judgment and decree of the Subordinate Judge, 4th Court of Dacca, dated the 3rd January, 1922.

The material facts of the case are sufficiently set out in their Lordships' judgment.

The principal point for determination on this appeal was whether there was any reference to arbitration and whether the alleged arbitration and award thereon and *ekrarnama* had any real basis; and assuming that they were so, whether they were void being contrary to public policy.

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*P.C. Appeal No. 17 of 1928. 21st January, 1930.
Beng. Appeal No. 61 of 1925.

P. C.

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The Trial Judge held that the agreements in question were to stifle a criminal prosecution for a non-compoundable offence (forgery, etc.) and that the plaintiffs could not get any relief on the basis thereof. The High Court took the contrary view. After referring to section 23 of the Indian Contract Act, 1872, and illustration (*h*) thereto, the learned Judges proceeded:

"The essential element in what is described by English lawyers as 'stifling a prosecution' is the tampering with the administration of justice by a private individual. It is quite true that in this case a complaint of a criminal offence was laid by the plaintiffs' servant against several of the defendants, and that after the award had been made, no steps were taken to produce the evidence for which the Magistrate had called. The defendants, however, were never brought before the Court as accused persons. On the contrary the learned Magistrate expressed grave doubts about the truth of the complaint, and directed the complainant to establish a *prima facie* case before he issued process; and he dismissed the complaint under section 203, Criminal Procedure Code, when the complainant said that his witnesses had been gained over. In these circumstances I do not think it can be said that a prosecution was dropped; still less do I think that there was any tampering with the administration of justice by the complainant or that the complainant usurped the functions of the Judge. Again, looking at the broader features of the case I should be very reluctant to hold that the institution of the complaint rendered void the reference to arbitration. On the one side the defendants had recourse to the summary provisions of the Registration Act, and afterwards to a suit under section 77 of that Act, while the plaintiffs filed a complaint about the truth of which the Magistrate was not satisfied. It would be carrying the doctrine of public policy to absurd length to hold that the presentation of the complaint debarred the parties from resorting to the sensible method of arbitration. In my opinion, therefore, the agreement to refer the dispute to arbitration cannot be treated as void."

Against the said judgment of the High Court the defendants preferred the present appeal to His Majesty in Council.

P. V. Subba Rao for appellants.

The respondents were not represented at the hearing.

21st January, 1930. Their Lordships' judgment was delivered by

Sir Binod Mitter.

SIR BINOD MITTER.—The facts out of which this appeal arises are as follows:—

The Basu family referred to in the pleadings in the suit owned Taltola Hat and Bazar, which was an old and established Hat of considerable repute. It was originally held on land owned by the Basu family on the bank of the River Dhaleswari. The site of the Hat had to be changed from time to time owing to the action of the river, and ultimately, in the year 1916, there was no land owned and possessed by the family on which the Hat could be held and it was removed to some lands belonging to a Mussalman family. There was a great scramble for the

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purchase of such lands from the different members of the Mussalman family amongst the plaintiffs on the one hand and the principal defendants on the other. One Abdul Aziz purported to execute conveyances in favour both of the plaintiffs and the principal defendants in respect of the same land, and in the course of the proceedings taken by both parties to have their respective documents registered, he sometimes admitted and sometimes denied the execution of such documents before the Sub-Registrar.

On the 14th December, 1916, one Rohini, a servant of the plaintiffs, and on their behalf, complained before the Sub-Divisional Officer of Munshigunj, against various persons, including some of the principal defendants, namely:—

Paresh Chandra Basu, defendant No. 16.

Gopal Chandra Basu, defendant No. 13.

Benoy Chandra Basu, defendant No. 14.

Krishna Kumar Basu, defendant No. 18.

Kamini Kumar Basu, now defendant No. 2 (son of Ananta Kumar Basu, since deceased, who was originally defendant No. 2 in the suit).

Charging them with having committed offences under sections 465, 467, 193 and 194 of the Indian Penal Code, all of which offences were non-compoundable. The persons against whom the complaint was made are referred to for the purposes of the judgment as the accused in the criminal proceedings. The Magistrate did not issue any summons, but directed the complainant to prove his case on the 8th January, 1917.

The criminal proceedings served to bring matters to a head, and after its institution Ananta, whose son, Kamini, was accused No. 6, became exceedingly alarmed, and was very anxious to have all the disputes settled between the plaintiffs and the defendants, including the criminal proceedings. He desired that the disputes should be referred to the arbitration of A. C. Basu, a relation of the parties, and one of the *pro forma* defendants in the suit.

The disputes as to the title concerned the plaintiffs and defendants Nos. 1 to 21. A. C. Basu in his deposition stated that at the time of the reference there were only present the plaintiff Birendra, Ananta and the accused Benoy, Paresh and Krishna. The reference was oral, and only two sittings were held, namely, on the 27th and the 29th December. The only

persons who attended both days were the plaintiff, Ananta, and the accused, Benoy, Paresh, Krishna and Kámini (son of Ananta). A. C. Basu further stated that no evidence, oral or documentary, on the question of title was produced before him, and on the 29th December he delivered an oral award which was followed by a written memorandum, which is not forthcoming. A memorandum purporting to be a copy of the award, and dated the 12th August, 1917, signed by one A. C. Samanta, and the arbitrator, is on the record. The arbitrator further stated that it was provided by the award that all the interested persons, and not merely those who made the reference or who appeared before him, would execute an agreement embodying the result of his decision. According to him the award had declared that the plaintiff and the principal defendants 1 to 21 would get 3 annas 12 gundas and 12 annas 8 gundas shares respectively, of the proprietary interest of the Hat land. The award also purported to deal with certain pecuniary interests of the *pro forma* defendants (Nos. 22—72).

On the 8th January, 1917, the criminal proceedings came up before the Magistrate, but, at the instance of the parties, were adjourned to the 24th January.

On the 23rd January, 1917, after 9 o'clock in the evening, an *ekrarnama* was executed by Ananta, his son Kamini, his brother Joyanta, defendant No. 3, and defendants Nos. 5, 6 and 10, *i.e.*, Debendra Kumar Basu, Surendra Kumar Basu and Sanat Kumar Basu. They were very near relations of Ananta. By this *ekrarnama* its executants admitted that the plaintiffs have title and possession to 3 annas 12 gundas share of the land in suit. The *ekrarnama* further provided that if the other co-sharers of the land did not join with the executants in executing a *solehnama* or other appropriate deed within six weeks from the date thereof, then the executants would execute a proper deed in favour of the plaintiffs, making up their aforesaid share of 3 annas 12 gundas out of their own share. None of the executants except Ananta had taken any part in the arbitration proceedings, and were in no way bound by them.

On the 24th January the complainant Rohini put in a petition before the Magistrate, alleging that his principal witnesses had been won over by the accused, and he further alleged that the dispute had already been settled. On this petition the Magistrate dismissed the case under section 203 of the Criminal Procedure Code for non-production of evidence.

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The learned Subordinate Judge held that the real object of the reference to arbitration was not to get a judicial decision on the question of the right and title of the plaintiffs in the lands in dispute, but to placate the plaintiff Birendra, and induce him to withdraw from the criminal proceedings. He further held that the *ekrarnama* was not a *bona fide* settlement of the dispute, but was executed with a view to securing the withdrawal of the criminal proceedings on charges of forgery and other non-compoundable offences, and that the consideration wholly or in part, of this agreement, was unlawful and, therefore, the agreement was void.

The High Court disagreed with the learned Subordinate Judge, and held that the reference to arbitration was a *bona fide* one for the settlement of the disputes as to title. They further held that the persons against whom the complaint was made were never brought before the Magistrate as accused persons, and that as the Magistrate dismissed the complaint under section 203 of the Criminal Procedure Code, the prosecution could not be said to have been dropped, implying thereby that the stage at which a prosecution could be said to have commenced had not been reached within the meaning of the Criminal Procedure Code. They further held that in the circumstances aforesaid there was no tampering with the administration of justice by the complainant or that he usurped the functions of the Judge. The High Court, on the basis of their findings that the award and *ekrarnama* were valid, gave certain relief to the plaintiffs against the persons who had taken part in the arbitration proceedings or who had signed the *ekrarnama*. From this judgment and decree of the High Court the defendants, the representatives of Ananta, and defendants Nos. 3, 5, 6, 10, 14, 16 and 18 have appealed to this Board.

It may quite well be that a prosecution only commences after a summons is issued, and that before that stage is reached a complainant cannot be said to have dropped a prosecution under the Code. (See *Golap Jan* v. *Bholanath.*[1])

Their Lordships are not called upon to express any opinion on this point, nor are they doing so. The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the *ekrarnama* was unlawful, and not whether any prosecution within the meaning of the Criminal Procedure Code had been started or dropped. If it

1. (1911) I.L.R. 38 C. 880.

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was an implied term of the reference or the *ekrarnama* that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the *ekrarnama*, as the case may be, is unlawful (see *Jones* v. *Merionethshire Permanent Benefit Building Society*[2]) and the award or the *ekrarnama* was invalid, quite irrespective of the fact whether any prosecution in law had been started.

With regard to the award there is a further question, namely, whether, assuming that there was a valid reference, the award was capable of being enforced against any of the defendants.

Their Lordships will first of all determine the validity of the *ekrarnama*.

In a case of this description it is unlikely that it would be expressly stated in the *ekrarnama* that a part of its consideration was an agreement to settle the criminal proceedings. It is enough for the defendants to give evidence from which the inference necessarily arises that part of the consideration is unlawful. There is, however, in this case, the evidence of Sasanka, who acted as a pleader for the plaintiffs, and was called by them in this suit. He stated before the learned Subordinate Judge as follows:—

"The former case was withdrawn the day after the execution of the agreement, at the time of which there had been an understanding between the parties that the parties would withdraw from their respective criminal cases. I understand that the result of the agreement would be to settle all disputes including the criminal cases."

Amulya, another pleader also called by the plaintiffs, stated:

"I know that the object of the compromise was to bring about a reconciliation including the dropping of the prosecution."

There is no doubt that the parties had agreed not to proceed with the complaint, as the complainant in his petition, dated the 24th January, stated to the Magistrate that the dispute had been settled.

The fact that the *ekrarnama* was executed only by Ananta and his very near relatives, none of whom was bound by the arbitration proceedings, is very significant. The only question is whether the agreement settling the criminal proceedings was arrived at before or after the execution of the *ekrarnama*. The *ekrarnama*, as has already been stated, was signed after 9 P.M.

2. (1892) 1 Ch. 173 (C.A.).

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on the 23rd January, and it is hardly credible that after its execution the plaintiffs for the first time decided not to proceed with the complaint. Their Lordships have no hesitation in holding that, prior to the execution of the *ekrarnama,* it was an implied though not an expressed term, that in consideration of the executants admitting the shares of the plaintiffs they would not proceed with the charges laid by them against the accused. It is also a significant fact that when after the execution of the *ekrarnama* and the dismissal of the criminal proceedings the executants of the *ekrarnama* did not carry out its terms, the plaintiffs took steps to revive the criminal proceedings, though without success. For these reasons the *ekrarnama* is not enforceable against its executants.

The next question that calls for determination is whether any part of the consideration for reference to the arbitration was unlawful. The only persons amongst the principal defendants who joined in the reference were Ananta, Benoy, Krishna and Paresh. The criminal proceedings were pending at the time of the reference against the last three mentioned persons and the son of Ananta. The dispute affected the other principal defendants, as also the *pro forma* defendants, and no proper settlement could have been reached unless the other defendants joined in the reference.

The learned Subordinate Judge held that the arbitration proceedings were "hasty and rapidly run through somehow to placate the plaintiff Birendra and to induce him to withdraw the criminal case."

Nothing was done to give effect to the award, and the proceedings were adjourned from the 8th to the 24th January, on which date*, as has been stated, the *ekrarnama* was executed, which in effect took the place of the award.

Their Lordships have set forth in the early part of the judgment the circumstances under which the reference was made and the manner in which the arbitration was conducted, and they are of opinion that the finding of the learned Subordinate Judge that the reference was not a *bona fide* reference for settlement of civil disputes only is amply borne out by the evidence in the case. Their Lordships are also of opinion that the award was incomplete and that the parties whose presence was absolutely necessary to make it valid were never before the arbitrator.

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*The ekrarnama was executed on the night of the 23rd January.—K.J.R.

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For these two reasons their Lordships are of opinion that the award is not valid. The suit, therefore, so far as it is based on the *ekrarnama* and the award, should be dismissed.

The plaintiffs' suit was based upon their alleged title by purchase, and, alternatively, upon the award and the *ekrarnama*.

The learned Subordinate Judge held that the plaintiffs had succeeded in proving their title of purchase to the extent of 1 anna 4 pies share of plots Nos. 472, 473, 474 and 842. The High Court did not think it necessary, by reason of its findings on the award and the *ekrarnama*, to determine this question. Their Lordships think that this part of the case, not having been investigated by the High Court, should be remitted to them for further investigation. It does not appear that the plaintiffs ever gave up this part of their case.

For the reasons stated above their Lordships think that the decree of the High Court should be set aside. The defences raised by the appellants were not commendable although they are compelled to give effect to them upon grounds of public policy indicated in their judgment. They will, therefore, not give any costs of the appeal before them or before the High Court. The learned Subordinate Judge did not give any costs to any of the parties and their Lordships think that his direction as to costs was right and they will not interfere with it. The costs of the further investigation of the title will abide the result.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Francis & Harker.*

Solicitor for respondents: *Ex parte.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Court of Appeal of New Zealand.]

PRESENT:—LORD CHANCELLOR, LORD SHAW, LORD CARSON, LORD BLANESBURGH AND LORD TOMLIN.

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Dorothy Valentine Burnard .. *Appellant**

v.

William Douglas Lysnar .. *Respondent.*

Surety—Principal debtor or—Deed by two persons in respect of their joint and several debt—Liability of each of them as principal debtor under

*P.C. Appeal No. 80 of 1928. 13th June, 1929.

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--*Agent of surety--Arrangement with creditor by—Binding nature on surety of—Agent principal debtor himself—Effect.*

An arrangement made on behalf of the surety by an agent in that behalf previously authorised or whose purported authority is afterwards ratified is as binding upon the surety as if in the first instance the arrangement had been made by himself and none the less because the surety's representative in the arrangement with the creditor was the principal debtor himself.

For the price of goods supplied to G.H.L., he made a promissory note, which was endorsed over by the respondent, his brother. Default having been made in the payment of the note, the due holder thereof commenced an action against both the brothers on the amount of the note. When the plaintiff was in a position to enter judgment for the amount claimed, the brothers executed a deed, expressed to be made between them, as grantors, of the one part, and the plaintiff, as grantee, of the other part. It recited that the respondent was the owner of the chattels scheduled to the deed; that "the grantors are jointly and severally indebted to the grantee in the sum of £5,280," and witnessed that in consideration of that sum then owing by the grantors to the grantee "(as they do and each of them doth hereby admit)," the respondent assigned to the grantee the scheduled chattels by way of mortgage only for the purpose of securing its repayment with interest in the manner thereinafter provided, and the grantors jointly and severally covenanted *inter alia* for repayment on or before a specified date in the manner provided by the deed.

Held, that the position of the respondent under the above-mentioned deed was that of a principal debtor and not that of a surety only for his brother.

Wilfred Greene and *J. H. Stamp* for appellant.

Respondent in person.

13th June, 1929. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—The action out of which this appeal arises was in 1927 commenced in the Supreme Court of New Zealand by the appellant as plaintiff against the respondent and his brother, George Henry Lysnar, as defendants. Its purpose was to enforce so far as then unperformed the obligations of the defendants under a deed of security and joint and several covenant, dated the 21st December, 1923, and made by them in favour of one Charles John Dunlop Bennett, to whose rights thereunder the appellant had succeeded by a deed of transfer duly registered on the 7th August, 1924. The defendant George Henry Lysnar at the trial submitted at last to judgment, and he has disappeared from the subsequent proceedings. The respondent's main defence was that he was no more than a surety for his co-defendant in respect of their joint and several covenants contained in the deed, and that he had been discharged from all liability thereunder by reason of a certain arrangement for giving time alleged to have been come to between the appel-

lant and the principal debtor without the respondent's "approval or consent," a somewhat ambiguous phrase.

The Courts of the Dominion, perhaps accepting the allegation at its face value, assumed, as it would appear, without any definite inquiry into the circumstances, that the arrangement alluded to was one for which George Henry Lysnar was solely responsible, and they did not concern themselves to ascertain how far, in fact, the respondent was cognizant of and had become bound by its terms. In consequence they occupied themselves chiefly with the question—in their eyes the most important—whether notice of the position of the respondent as a surety only could properly at the date of the arrangement be imputed to the appellant. And in the result these Courts were in difference as to the proper answer. The learned Trial Judge held that such notice could not be so imputed and decreed the action against the respondent. The Court of Appeal, on the other hand, being of opinion that the appellant must at the critical date be fixed with notice of the respondent's position as between his brother and himself, adjudged the respondent to be discharged by the arrangement referred to from all further liability under the deed, and by an order of the 18th October, 1927, dismissed him from the action with costs. Hence the present appeal.

In the course of the arguments before the Board, not only this question on which the Dominion Courts were divided, but many others of interest in connection with the law of suretyship, were fully canvassed. A review of the whole case has served, however, to make it clear to the Board that such questions may not survive for determination by them if an affirmative answer is, on investigation, given to the fundamental inquiry not so far judicially pronounced upon, *viz.*, whether the respondent must not be held to be as completely committed to and bound by the arrangement referred to as was his co-defendant who concluded it. In the review of the facts to which their Lordships now proceed they will not stop until they have examined those upon which the answer to this preliminary and, it may be, decisive inquiry must depend.

The debt secured by the deed of the 21st December, 1923, originated in a promissory note for £5,215 1*s.* 10*d.*, dated the 24th May, 1922, made by George Henry Lysnar, and endorsed by the respondent, in favour of a firm of Bennett & Sherratt. The note was for the price of goods supplied to George Henry Lysnar. On the subsequent dissolution of the firm of Bennett

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and Sherratt the above-named Charles John Dunlop Bennett became its holder in due course. Default was made, and on the 26th October, 1923, Mr. Bennett, having failed to obtain payment, commenced an action against both of the Lysnars for the amount of the note.

No defence was put in by the defendants and the plaintiff being thus in a position to enter judgment for the amount claimed, intimated to each defendant by identical letters of his solicitors, Messrs. Burnard & Bull, that, failing payment by the morning of the following 20th December, 1923, judgment would be entered and proceeded upon without delay.

These letters brought both defendants to the solicitors' office on the date named. There they had an interview with Mr. Burnard, in the course of which the respondent explained that it was then inconvenient to find cash for the amount due, and he offered to furnish security from his own property if time for payment were given and judgment in the action not taken. This was agreed to by Mr. Burnard on Mr. Bennett's behalf subject to the execution by the respondent and his brother of a deed embodying the terms then foreshadowed. Instructions to prepare such a deed were given by Mr. Burnard to his partner, Mr. Bull, and the actual deed of the 21st December, in which the final terms are embodied, shows on its face the alterations before execution made in the draft as so prepared.

The deed executed is expressed to be made between the two brothers, as grantors, of the one part, and Mr. Bennett, as grantee, of the other part. It recites that the respondent is the owner of the chattels scheduled to the deed: that "the grantors are jointly and severally indebted to the grantee in the sum of £5,280," and witnesses that in consideration of that sum now owing by the grantors to the grantee "(as they do and each of them doth hereby admit)," the respondent assigns to the grantee the scheduled chattels by way of mortgage only for the purpose of securing its repayment with interest in the manner thereinafter provided, and the grantors jointly and severally covenant *inter alia* for repayment on or before the 20th December, 1926, of the £5,280 in the manner following:—

(*a*) £1,000 on or before 20th January, 1924.

(*b*) £1,000 on or before 20th January, 1925.

(*c*) £1,000 on or before 20th January, 1926.

(*d*) The balance on or before 20th January, 1927.

The principal moneys outstanding are also expressed to carry quarterly payments of interest at the rate of 10 per cent. per annum, reducible on punctual payment to 8 per cent.

It is not questioned—it has, indeed, been admitted by the respondent—that the deed on its face contains no indication or suggestion that his position thereunder is that of a surety only. On the contrary, his part in the transaction is to all appearance that of protagonist. His name is first in the order of liability. It is his separate property which is made security for a debt recited as being one for which each obligant is at the moment of execution jointly and severally liable. And the significance of all this is the more marked when it is remembered that the liabilities of the respondent to the grantee were not by the deed being assumed for the first time. Indeed, to their Lordships it seems clear that the liability which was then being dealt with was treated as the equivalent of the liability on the part of the grantors which would have been constituted by the mere formality of entering judgment against them in the pending action. In other words, their former obligations in respect of the note were treated as having ripened into a joint and several debt of agreed amount immediately exigible. If that debt was not at once to be enforced, then, in respect of it, new obligations had to be entered into and security for its repayment provided. All of which was the purpose of the deed.

To meet these obstacles to the success of his main defence the respondent at the trial was concerned to prove that as between himself and his brother he had been and that, in respect of the new covenants, he remained, no more than a surety, and, further, that notice of that fact was expressly given by him to Mr. Burnard prior to the execution of the deed. Upon much of this, as it turned out, there was no real contest. It was not seriously disputed that the respondent's original liability under the promissory note transaction had been that of a surety only, while his statement that, by later arrangement with his brother, it so continued under the deed was not seriously challenged. Further, it may be inferred from the evidence of Mr. Bennett that the position of the respondent as surety under the promissory note ought to have been known to him and also, although this was disputed, to Mr. Burnard as his solicitor. Finally, the appellant accepted the position that any notice or knowledge imputable to her husband was equally imputable to herself.

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But here real conflict began. No attempt was made by question or otherwise to establish that Mr. Bennett, on receiving the deed of 1923, had any reason to suppose that as between the grantors the obligations thereby undertaken were other than they thereby appeared, and the evidence of the respondent, which sought to establish that he had brought home to Mr. Burnard by express statement the fact that he remained a surety only in the transaction was not accepted by the learned Trial Judge. The respondent's recollection, given in evidence, was that in the draft of the deed shown him there appeared a recital that he was a principal debtor, that he insisted on the deletion of that statement, and that after heated words Mr. Burnard agreed to such deletion. But both Mr. Burnard and his partner, Mr. Bull, denied that any draft with any such statement in it ever existed. The only draft was that which became the deed, and alterations made in it before execution showed on examination that it had never contained any such statement as the respondent had deposed to. And Mr. Burnard went further. Not only was no such statement made to him as the respondent had asserted, but had he himself supposed the respondent to be a surety he would have had to take his client's instructions before he accepted any security which did not, like a banker's mortgage, relieve the creditor from all consequential embarrassments. And the learned Trial Judge accepted Mr. Burnard's evidence on this matter, and his findings have not since been questioned. And it was not suggested to him, nor has it with any effect been suggested since, that notice of the respondent's position of suretyship under the deed was at any relevant subsequent date given or imputable to Mr. Burnard, or, through him or otherwise, to the appellant his wife. The question, therefore, whether notice of the respondent's suretyship in respect of the covenants in the deed may properly be imputed to Mr. Burnard at the date of the arrangement, in a moment to be referred to, must now, in the face of his accepted statement that he did not suspect it, be made to depend entirely upon the fact that he knew, or must be taken to have known, that the relation of surety and principal existed between the respondent and his brother in relation to the liability under the promissory note, and that, notwithstanding the obligation into which that liability had ripened, and notwithstanding the readiness of the respondent to execute a security which appeared to negative the continued existence of the relationship, Mr.

Burnard was bound to presume that suretyship persisted until by inquiry he ascertained that it had ceased.

Their Lordships have thought it right to review in detail the facts with reference to which this question of imputed notice must in this case be decided. They have done so because, as they see these facts, the resulting proposition of law is very different from that discussed by the Court of Appeal when that Court decided this issue in the respondent's favour.

But having said so much, their Lordships pass on. They will return to this question if, having examined the later history, they find that any decision of theirs upon it is called for.

That subsequent history is simplified if the fact be borne in mind that, beyond his liability under the deed to Mr. Bennett, Mr. George Henry Lysnar had mortgaged certain of his properties to Messrs. Burnard & Bull to secure a separate indebtedness of his own. With that indebtedness the respondent was in no way concerned, but it is from time to time referred to in, and had considerable influence upon, the correspondence to which attention will presently be directed.

As to the first instalment of £1,000 payable under the deed, no question arises. It was duly satisfied as arranged. No interest, however, was paid in 1924, and on December 22nd of that year the respondent and George Henry Lysnar were notified by Mr. Burnard in identical letters that £1,000 principal was due on the 20th January, 1925, and that, in addition to the overdue interest, payment of that amount would be required on that day. To this demand upon each of them no response was made either by the respondent or George Henry Lysnar.

On January 21, 1925, a further letter was addressed by Mr. Burnard to George Henry Lysnar, and a copy of it sent by him at the same time to the respondent. In that letter Mr. Burnard complained that his letter of the 22nd December had been ignored: interest amounting to £428 had accrued: matters could not be allowed to stand over any longer in that unsatisfactory state, and the security was now overdue: provided, however, that £400 was paid by George Henry Lysnar in respect of his personal mortgage to the writer's firm, and the sum of £428 interest and £600 principal upon the security from the respondent and himself paid, the writer would be prepared to treat that security as current and allow a further three months for payment of the balance of overdue principal, £400. The letter concluded as follows:—

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"You will understand that if this proposal is not strictly complied with I shall be obliged to take steps to enforce the security."

It is not suggested that either obligant had any answer to the demand made by the letter of the 22nd December, and the last passage in the letter of January 21st must have shown the respondent, when he read it, that in the absence of some arrangement for postponement the security furnished by himself was at serious risk. In other words, the demand made upon him was direct, and the consequences of neglect serious.

In the similar situation of December, 1923, the demand then made brought, as has been seen, both the respondent and his brother to Mr. Burnard's office, with the result already stated. On this occasion the demands brought George Henry Lysnar alone, and he had several interviews with Mr. Burnard. The arrangement of which so much has been heard in these proceedings was reached at the last of these interviews on the 27th March, 1925. Throughout them all, their Lordships cannot doubt, George Henry Lysnar was present, not only on his own account, but with full knowledge of the respondent, and intent on making, on behalf of both, as he purported to do, the best arrangement possible for postponing payment of what was due.

The arrangement for postponement reached between Mr. Burnard and George Henry Lysnar on the 27th March is correctly embodied, as is agreed, in the memorandum of its terms prepared by Mr. Burnard and sent by him on the same day to George Henry Lysnar in order, as he says, that the signatures of the respondent and himself might be attached thereto, and the document be then exchanged for one in like terms signed by himself.

By the first clause of the memorandum the interest then accrued is agreed at £581. Clauses 2 and 3 are as follows:—

"2. The Messrs. Lysnar are to pay £120 on account of such accrued interest, leaving the sum of £461 to be paid on 1st December next.

"3. The Messrs. Lysnar desire the principal sum of £1,000, which fell due on 20th January last, to remain on until 1st December next. It is agreed that the Messrs. Lysnar shall pay £80 by way of premium and shall pay the said sum of £1,000 on 1st December next, together with the above sum of £461, being the sum of £1,461 in all."

By the final clause it is provided that all further payments of interest and all other obligations under the security are to be duly performed and observed.

The memorandum was accompanied by the following letter addressed to George Henry Lysnar:—

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"W. D. AND G. H. LYSNAR TO L. T. BURNARD.

"We enclose herewith statement of agreement regarding this security, the understanding being that, provided your order for £600 on Messrs. Common, Shelton & Co. is duly met, and the sums of £400 owing to Messrs. Burnard & Bull under Memorandum of Mortgage, and of £60 and £120 mentioned in attached memorandum [paid], then the agreement contained in such memorandum shall take effect."

It is not necessary to look beyond this memorandum and its accompanying letter to see that the only agreement there recorded was one with both obligants and that it originated in the expressed desire for postponement, not by one, but by each of them. That such was its nature has never been denied by George Henry Lysnar, who negotiated it, and, as it seems to the Board, it was, in these circumstances, only natural that the record of the agreement as adjusted should be sent to George alone.

It is, however, unfortunate that the precaution of sending copies to the respondent was not taken, for the omission has in these proceedings been magnified by him into a circumstance of decisive importance.

Yet truly it was in the result of no consequence whatever. The respondent has never alleged that because no such duplicates were sent to him he remained in ignorance either of the terms of the documents or of what had happened. Indeed, before the Board he stated that he was willing that his case should be determined on the footing that everything that had passed between Mr. Burnard and George Henry Lysnar was at once communicated to him. And this conclusion their Lordships would themselves have reached, even if the respondent had not expressed his willingness that they should assume it. They have seen the respondent and have had the opportunity of appreciating his intelligence, and they cannot doubt that he speedily informed himself, through his brother, of the terms upon which alone Mr. Burnard's demand for immediate payment and his threat to enforce the security had been withdrawn. Any doubt their Lordships might otherwise have entertained on this subject is dispelled by the respondent's reception of Mr. Burnard's succeeding letters to himself. These letters as the respondent agreed when the question was put to him, are written by one who is assuming, as a matter of course, both the knowledge of the agreement and the adhesion of the respondent to it. And from the respondent there is neither protest against nor disclaimer of that position.

The letters are so striking that their Lordships think it right to refer to them specifically. They feel a satisfaction that

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their conclusions on this part of the case do not have exclusively to depend on concessions made in the course of argument by a respondent in person.

The first letter is as early as the 1st April, 1925—written, that is to say, before the agreement of March 27th had ceased to be conditional. Messrs. Common, Shelton & Co. had refused to pay over the £600. The letter goes on:—

> "This is completely contrary to Mr. George Lysnar's statement to the writer that the matter had been definitely arranged with Mr. Smallbone, and will make it impossible for the matter to be completed on the lines arranged.
>
> "Under these circumstances, we have to notify you that, failing the matter being carried out as previously arranged by 10 A.M. on Friday next, 3rd inst., we will be obliged to take immediate steps to enforce the security."

This letter the respondent received in silence. Later George Henry Lysnar paid the £600 in two instalments, and on June 25, 1925, after payment of the second of these, Mr. Burnard sent to the respondent a memorandum of the moneys due to date. "You will recollect," the letter says, "that under the arrangement made on the 27th March last the arrears of principal and interest due to that date were allowed to stand over until December 1st next, the sum of £1,461 to be paid on that date."

To this letter again the respondent made no response. There is no correction, protest, nor disclaimer. There is merely the continued enjoyment by himself of the benefits secured by the agreement referred to.

In December the moneys promised were not paid, and on March 26, 1926, Mr. Burnard again wrote the respondent. After saying that Mr. George Lysnar had made a definite promise towards the end of November that the matter would be settled by the middle of December, he continues: "Unless payment is made by 10 o'clock on Thursday next, the 1st April, I shall have to proceed to enforce the security."

Again no reply from the respondent. But on April 14, 1926, a sum of £1,750 on account was paid to Mr. Burnard, being part of a larger sum of £2,500 then, although unknown to Mr. Burnard, raised for the purpose by George Henry Lysnar on the guarantee of the respondent. And on the same 14th April, 1926, there was sent to the respondent a statement of account showing £3,465 2*s*. 0*d*. still covered by the deed, after credit given for the £1,750. Again no response or disclaimer of any kind from him.

And so matters on this subject remained until, this action having been commenced in consequence of further defaults, the respondent in his statement of defence for the first time alleged that the agreement of the 27th of March, 1925, having been made without his approval or consent, he as a mere surety was thereby discharged from all liability under the deed sued on.

Their Lordships on the above review of the facts can have no doubt that this allegation of the respondent's has not been made good. Whether the arrangement was made without his previous approval or consent—which may be all the allegation is intended to convey—they do not pause further to inquire, because they are satisfied that if the arrangement in terms made on his behalf as a party thereto was not previously authorised, it was subsequently ratified by him, so that it became an arrangement with himself as completely as if his signature had been in the event attached thereto. It is only thus that without attributing to the respondent a dishonourable silence which their Lordships would be slow to impute to him, his failure to dissociate himself from the agreement, as an answer to Mr. Burnard's successive letters, can be understood. It is only thus that his joining with George Henry Lysnar as late as 1926 in raising money towards meeting Mr. Burnard's demands can be explained.

The respondent sought to account for his silence and action by suggesting that until by service of the writ a direct demand for payment by himself was made, he had not troubled to investigate and did not really know the facts. It was only after the inquiry which he then made that he came to realise that he had by the arrangement of March, 1925, been completely discharged.

The respondent does not in this statement do himself justice. Direct demands upon him for payment had been made, as has been seen, before the arrangement, on the 22nd December, 1924, and the 21st January, 1925, and, after it, on the 1st April, 1925, and the 26th March, 1926. His knowledge of the arrangement itself he has never denied. This inquiry of his after writ could not have brought him knowledge of any relevant fact that he had not thoroughly known all along. What may well have been suggested to him by it was the view of the law, since apparently entertained by him, that, notwithstanding all the circumstances just stated, he was as a surety discharged because notice of the arrangement had not been directly sent

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him on the appellant's behalf, and because he had not expressly agreed to be bound by its terms after such notice had been so given him. And this was his contention before the Board.

But the view of his legal position, as so contended for by him, has, in their Lordships' view, neither principle nor authority to support it. An arrangement made on behalf of a surety by an agent in that behalf previously authorised or whose purported authority is afterwards ratified is as binding upon the surety as if in the first instance the arrangement had been made by himself and none the less because the surety's representative in the arrangement with the creditor was, as here, the principal debtor himself.

Their Lordships accordingly do not find it necessary, so far as this defence of the respondent is concerned, further to consider the question of notice which they have reserved.

Nor, although for a different reason, is this necessity imposed upon them by a further defence to the claim against him put before the Board by the respondent, but not dealt with either by the learned Trial Judge or by the Court of Appeal. George Henry Lysnar had, the respondent suggested, at a later date been given further time by the appellant without his knowledge or consent, and he, as a surety, was thereby discharged. On April 14, 1926, when Mr. Burnard was paid by George Henry Lysnar, as above appears, £1,750 on account, there was then due, not only principal and interest in arrear amounting in all to £2,474 2*s*. 0*d*., but the whole amount secured by the deed. That had become immediately payable by reason of default in payment of the overdue instalments. In these circumstances, so the respondent contended, not only did Mr. Burnard agree that the balance then due of £724 2*s*. 0*d*. should stand over until the 20th January, 1927, but he renounced his right to immediate payment of the whole debt then unpaid. To all of which the answer is that no such agreement to postpone has either been proved or found, while, as to the so-called renunciation, a reference to the deed already set forth shows quite clearly that default in payment of instalments at their due date does not accelerate any instalment not then payable.

Before the Board the respondent also rested this part of his case on a statement of Mr. Burnard's in a letter to George Henry Lysnar of November 27, 1927: "We are, however, prepared to wait until 20th January for payment of the whole of the remaining principal." And that money was due and

payable, so says the respondent, on the previous 20th December, 1926.

To which the answer is that it was not so payable, and that the view of George Henry Lysnar in his letter of 26th November, 1926, and accepted by Mr. Burnard, was quite correct. Whatever effect might have to be given to the provision of the deed that the principal sum of £5,280 as one sum was to be paid on the 20th December, 1926—its retention in the deed is an obvious oversight when the original is looked at —it remains the fact that for payment of the last instalment as such no date earlier than the 20th January, 1927, is fixed.

Moreover, their Lordships can in this statement find no agreement at all to postpone—certainly none supported by any consideration. This contention, which was almost trivial, fails the respondent also, and no other answer to the claim against him being put forward by the respondent before the Board, it follows that the appeal succeeds.

To the respondent's case the appellant had further answers, to which no allusion has here been made. It is not, in the circumstances, necessary for the Board further to consider these.

On the whole case their Lordships are of opinion that the order of the Court of Appeal of the 18th October, 1927, should be discharged, and that the order of the learned Trial Judge of the 12th April, 1927, should, for the reasons just given, be restored. And their Lordships will humbly advise His Majesty accordingly.

The respondent must pay to the appellant her costs in the Court of Appeal and of this appeal.

Solicitors for appellant: *Pritchard, Englefield & Co.*

Solicitors for respondent: *Linklaters & Paines.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Ramanathan Chetty .. *Petitioner** (*5th Respondent*)

v.

Alagappa Chetty and others .. *Respondents* (*Petitioner and Respondents* 1 *to* 4 *and* 6 *to* 13).

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Limitation—Suit for dissolution of partnership and for accounts—Final decree containing direction for taking accounts—Suit whether continues to be pending—Application for revised final decree in pursuance of direction—Applicability of Art. 181, *Limitation Act,* 1908.

In a suit for the dissolution of a partnership and for accounts the Court passed a final decree which besides containing certain provisions such as normally find place in a final decree for the dissolution of a partnership further directed that "the first defendant do take the good outstandings due to the firm as found in the Commissioner's report and that he do account to the other partners for the same." The decree was passed on 22nd March, 1915, but no attempt was made by any of the parties to enforce the direction given to the first defendant till 14th October, 1925, when an application was made by one of them for the passing of a final decree in pursuance of the direction.

Held, that the direction in the final decree was of an interlocutory character, that by force of it the suit continued to be pending and that the later application being one for the passing of a final decree was not subject to the law of limitation.

Srinivasa Mudali v. *Ramaswami Mudali,* (1915) M.W.N. 725, relied on.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Devakotta, dated 30th June, 1927, in I.A. No. 574 of 1926 in O.S. No. 31 of 1913 on the file of the Court of the Temporary Subordinate Judge of Ramnad.

C. S. Venkatachariar for appellant.

C. Padmanabha Aiyangar for respondents.

The Court delivered the following

JUDGMENT.—This revision petition is presented against the order of the Principal Subordinate Judge of Devakotta in the following circumstances. The suit out of which it arises was instituted for the dissolution of a partnership and for accounts in the Court of the Subordinate Judge of Ramnad. It was transferred to the then existing Temporary Subordinate Judge of Ramnad and he passed a preliminary decree, on 23rd October, 1913, dissolving the partnership from the date of the plaint

*C.R.P. No. 817 of 1927. 7th November, 1929.

and appointing a Commissioner to examine and report upon the accounts. The Commissioner presented his report on 14th January, 1915, and the Temporary Subordinate Judge passed a final decree on 22nd March, 1915. It is with the legal aspect of a passage in this decree that we are now concerned. The decree contains certain provisions such as normally find place in a final decree for the dissolution of a partnership and then occurs the following passage:

"This Court doth further direct that the 1st defendant do take the good outstandings due to the firm as found in the Commissioner's report and that he do account to the other partners for the same."

This is based upon a passage in the judgment which says:

"As the 1st defendant has always been the managing partner and as he has been instituting suits for recovery of all outstandings, etc., the good outstandings due to the firm as found in the Commissioner's report will be taken by him and he will account to the partners for the same."

It appears from the Commissioner's report that the parties failed to assist in the realization of the assets and the settlement of their accounts and accordingly he had to propose to the Court the appointment of a receiver for this purpose, and the Court decided to take the course above-mentioned. The 1st defendant appealed against this decree to the High Court but died before the appeal was disposed of. Nevertheless, the above-quoted passage was reproduced in the appellate decree. So far as we are concerned, it is agreed that we may disregard the appellate decree in this respect and may base ourselves upon the terms of the decree, dated 22nd March, 1915. No attempt was made by any of the parties to enforce the direction given to the 1st defendant until 14th October, 1925, when the 6th defendant, son of one of the partners, applied to the Additional Subordinate Judge of Ramnad at Madura to pass a final decree in pursuance of that direction. About a year later the application was returned by the Additional Subordinate Judge on the ground that he had no jurisdiction and it was represented to the Temporary Subordinate Judge of Devakotta.

I will deal first with an objection, which, however, has not been strongly pressed, that the Lower Court had no jurisdiction to deal with the suit. I have said that it was originally disposed of by the Temporary Subordinate Judge of Ramnad. That Court was abolished on 1st January, 1926, two Subordinate Judges being attached to the Sub-Court of Ramnad at Madura from that date. The application now in question had been filed before the change took place and assuming that the suit to which it related was a pending suit, it should have been trans-

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ferred to the Ramnad or to the Devakotta Court, since in the case of a pending suit a transfer of territorial jurisdiction will not *per se* result in a transfer of the suit: *Subramania Aiyar* v. *Swaminatha Chettiar*[1] and *Chokkalinga Pillai* v. *Velayuda Mudaliar*.[2] I infer that what took place was that all suits at the time pending before the Temporary Subordinate Judge of Ramnad were distributed between Ramnad and Devakotta, but that, inasmuch as the present suit had to all appearances been disposed of, no such order was made with regard to it. Section 37 of the Code of Civil Procedure would have sufficiently provided for any subsequent proceedings if the suit had already been disposed of; but if, as I propose to hold, the suit was still pending, a transfer order was technically necessary. Since, however, it has now been dealt with by the Court which has jurisdiction over the place where the cause of action arose, and to whose file it would certainly have been transferred if any transfer had been ordered, I think that the irregularity is no more than technical and does not form a fit subject for revision.

In the order under consideration the learned Subordinate Judge has given reasons for holding that the direction in the final decree is of an interlocutory character, that by force of it the suit is still pending, and that the application, which is in its nature an application to pass a final decree, is not subject to the law of limitation. He has, therefore, decided to take the suit on his file and proceed with it. This order has been attacked on two alternative grounds—

(1) the direction given to the 1st defendant is not in the nature of a preliminary decree, but if it is,

(2) the application is barred under Art. 181 of the second schedule of the Limitation Act, as having been made more than three years from the date of the decree.

It was in point of fact made about ten and a half years after the Trial Court's decree and six years after the High Court's decree.

It is contended in the first place that the Code contemplates only one preliminary decree and one final decree, whereas what we must refer to here as the final decree is in fact a composite decree, part final and part preliminary; so that the preliminary portion would require a further final decree to be passed. This

1. (1928) 28 L.W. 886. 2. (1924) 47 M.L.J. 448.

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position cannot, I think, be substantiated either by the terms of the Code or by any case-law. The definition of "decree" in section 2 (2) concludes with an explanation which says that a decree may be partly preliminary and partly final; and I can find nothing in the Code repugnant to the notion that more than one preliminary or more than one final decree may be passed. There are some observations of Krishnan, J., in *Ghulusam Bivi v. Ahamadsa Rowther,*[3] which deals with a partition suit, to the effect that the Code does not contemplate more than one preliminary decree and one final decree in one suit, and that to have two final decrees and to call the first one a final decree would be a misnomer. I do not think he intended to say that, where circumstances so require, the Court has no jurisdiction to pass a composite decree. A situation rather similar to the present forms the subject of some observations by Mukerjee, J., at page 260, *Raja Peary Mohan v. Manohar.*[4] He says:

"It may be conceded that the legislature contemplated that ordinarily there should be one preliminary decree and one final decree in a suit; the preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree. But as observed by Piggott, J., in *Yaqub Husain v. Bharatendu*[5] there may be exceptions, and the case before us furnishes an instance. Here the original suit was for removal of the *shebait,* for cancellation of the judicial sale and for recovery of the trust property. The decree made in the suit has directed the removal of the *shebait* and the cancellation of the sale subject to the investigation of accounts to be rendered by the *shebait* in a supplementary proceeding. The order which has now been made is in essence a preliminary decree in the supplementary proceeding and will lead up to the final decree to be made therein."

There is another Calcutta case, *Jashoda Dasee v. Upendra Nath,*[6] where it was found necessary to pass a supplementary final decree dealing with the portion undisposed of in the earlier final decree, that suit being one for partition. I do not think there can be any serious doubt that there is nothing illegal in passing more than one final decree, and in fact Mr. C. S. Venkatachariar does not go so far as to suggest it. What he does say is that such a course is so unusual that neither the Court nor the parties can be held to have contemplated it, and so far as the Court is concerned he points as an indication of intention to the omission to adjourn to a further date. He supports his argument by reference to Daniell's Chancery Practice, 8th Ed., Vol. I, page 686, where the test whether a judgment is interlocutory or final is said to consist in whether it adjourns

3. (1918) I.L.R. 42 M. 296.
4. (1923) 38 C.L.J. 255.
5. (1913) I.L.R. 35 A. 159: 11 A.L.J. 120.
6. (1918) 44 I.C. 671.

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the consideration of the cause or not. Where there is a final judgment, liberty to apply may be given without however altering the final nature of the judgment. I do not think, however, that inferences derived from Chancery practice can be safely applied to procedure in India, and it seems to me that no conclusive inference can be drawn from the mere circumstance that the Court failed to provide for any further hearing. We must, I think, look to the terms of the decree rather than speculate upon the Court's intentions, and ask ourselves what is the nature of this part of the so-called final decree. The plaint was framed in terms customary to a suit of this character and asked for the realization and distribution of the assets. Normally then the final decree should be such as is given in Form No. 22 of Appendix D to the Code of Civil Procedure, providing for the distribution of the fund in Court which has been realised by the receiver or otherwise. It is quite clear that the suit, when it was disposed of by the decree on 22nd March, 1915, had not been brought to its natural end, judged by these tests. In the Privy Council case *Muhammad Abdul Majid* v. *Muhammad Abdul Aziz*[7] the Trial Court had originally passed a decree for a declaration and for possession of immoveable property without deciding the question of mesne profits. About the mesne profits, indeed, the decree made no mention. Even so their Lordships held that the inquiry into mesne profits in the suit should proceed; and the following passage deserves quotation:

"The Subordinate Judge had before him a case consisting of two parts: a question of title and an incidental question of account depending largely on the title. It was for the obvious advantage of the parties, and they proposed, that the first should be decided and the second reserved for decision. In point of fact, the first part has been the subject of successive appeals by the defendant who successfully struggled against the trial of the second part pending these appeals. If the Code forbade the parties and the Court so to arrange the disposal of a law suit, it would be a very startling thing. It is not pretended that the Code contains any such prohibition."

These remarks I think apply *mutatis mutandis* to the present case. A decree means something which "conclusively determines" (a phrase substituted for "decides" by the Code of 1908) "the rights of the parties". Here it has left undetermined and undisposed of the distribution of assets to be realised by the 1st defendant, and the duty of the Court has accordingly not been completely discharged. I hold, therefore, that upon

7. (1896) L.R. 24 I.A. 22: I.L.R. 19 A. 155 (P.C.).

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this point the learned Subordinate Judge is clearly right. Even were the correctness of his decision less clear, it would scarcely be for this Court in revision to interfere where the Court below has declared its willingness to conduct the matters outstanding between the parties to their final conclusion.

Granting then that the direction to the 1st defendant amounts to a preliminary decree, it is further contended that where, as here, there is no adjournment order, further application should have been made within the time prescribed, and Art. 181 is said to prescribe that time. Whether this is so or not depends, I think, on whether it is to be held that between preliminary and final decrees the suit is pending, because it can hardly be contended that an application in a pending suit, as we ordinarily use that expression, is subject to limitation. Mr. Venkatachariar contends that after a preliminary decree has been passed the suit is not pending in the sense that the rights of the parties have still to be decided. Before going through some of the cases cited for this proposition, I will allude to the special case of mortgage suits. It has no doubt been held that applications for a decree absolute and for a personal decree, under Order 34, Rules 5 and 6, respectively, are subject to Art. 181: the decree-holder must apply within three years. (See *Ghulusam Bivi* v. *Ahamadsa Rowther,*[3] *Mummadi Venkatiah* v. *Bhoganatham Venkata Subbiah,*[8] *Rama Venkatasubba Aiyar* v. *Shanmugham Pillai*[9] and *Pell* v. *Gregory.*[10]) I do not think, however, that from these special cases a general proposition can be deduced. The rules under the Code make express provision for such applications and the Court has no duty cast upon it in the absence of them. The view I take in the present case is that the Court should itself have disposed of the suit, and that the Court, rather than the party, was responsible for further action.

On the question of the pendency of the suit, I have been taken through a number of cases under the old Code, mainly originating in Madras and Calcutta. There was, under that Code no such device as a preliminary and a final decree for the trial of partnership and partition suits, and different notions arose as to when the single decree should be passed and how much should be left over for execution, difficulties which no doubt gave rise to the introduction of the preliminary and final

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3. (1918) I.L.R. 42 M. 296.
8. (1921) 42 M.L.J. 51.
9. (1913) M.W.N. 867.
10. (1925) I.L.R. 52 C. 828 (F.B.).

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decrees. In *Seshan* v. *Rajagopala*[11] the decree passed for partition was in the nature of what we should now call a preliminary decree and the remainder of the operations had to be done in execution. In *Appadu* v. *Venkata Ranga Rau*,[12] on the other hand, the view taken was that in a partition suit the decree should ensue upon the actual division. The position was laid down in general terms by Bhashyam Aiyangar, J., at page 277 in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*[13], with regard to partition suits. He had of course to deal with a single decree, and when he said that a suit terminates only when the decree is fully effectuated and that it includes proceedings in execution, it may be conceded that the terms he used were used in a wider sense than we have to employ them here. The difficulties which arose in dealing with partition suits under the old Code are illustrated in *Latchmanan Chetty* v. *Ramanathan Chetty*[14], where the learned Judges found it impossible to decide what precisely was the decree in the suit. These cases, however, are not of much assistance here. More in point is *Srinivasa Mudali* v. *Ramaswamy Mudali*.[15] In that case a compromise decree for partition had been passed, and the question arose whether an application for the appointment of a Commissioner to work out the shares recoverable under it was barred by limitation. This depended on whether the application was in execution or in the suit. The learned Judges held that such an order could have been made by the Lower Court at any time of its own motion as a step in the disposal of the suit, and that there could be no question of any bar of limitation in connection with the application for it.

Turning to the Calcutta cases, *Kedarnath Dutt* v. *Harra Chand Dutt*[16] related to a partition, and in 1870 a decree was passed directing a commission to issue to effect the partition. For reasons which I need not go into, no effectual steps were taken for over 10 years, when the plaintiff applied for proceedings to continue. He was met by a plea of limitation, but Wilson, J., held that, the application being one in a pending suit, the right to apply was a right which accrues from day to day, and, therefore, it was not barred by lapse of time. It will be noted that this related to a stage in the cause after the only decree then provided for by the Code had been passed.

11. (1889) I.L.R. 13 M. 236. 12. (1907) 18 M.L.J. 23.
13. (1902) I.L.R. 25 M. 244: 12 M.L.J. 279 (F.B.).
14. (1904) I.L.R. 28 M. 127: 14 M.L.J. 436.
15. (1915) M.W.N. 725. 16. (1882) I.L.R. 8 C. 420.

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This case was followed by Stephen, J., in *Surendra Keshub Roy* v. *Khetter Krishto Mitter.*[17]

In the Full Bench case *Puran Chand* v. *Roy Radha Kishen*[18] it was held that where the decree provided that mesne profits should be ascertained in the execution department, no rule of limitation attached to an application to ascertain them. The view taken was that for that purpose the suit was still pending, and that the Court was bound, even without any application, to fix a date for the inquiry. The learned Judges say:

"There is nothing in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time, asking the Court to proceed to judgment."

This case was followed in *Dwarka Nath Misser* v. *Barinda Nath Misser*[19] in regard to an application to appoint an arbitrator in a partition suit, and printed with the report is a judgment of Prinsep and Ghose, JJ., to the same effect. It follows *a fortiori* that, on the principles underlying these decisions, an application for a final decree is an application in the suit and is not subject to any limitation.

As regards the position under the present Code, the petitioner relied mainly on the Full Bench case *Perumal Pillay* v. *Perumal Chetty.*[20] The question referred for decision was whether Order 22, Rules 3 and 4 of the Code of Civil Procedure applied to cases of death after the passing of the preliminary decree. The answer given was that the provisions did not apply and that the suit did not abate so as to vacate the preliminary decree. This question does not strictly concern us, but Mr. Venkatachariar has sought to derive from some observations of the learned Chief Justice, who delivered the opinion, the principle that a suit for all purposes is concluded by the preliminary decree. I have been unable to discover any such unqualified proposition in the judgment. The principle relied upon was that the right of action had been determined before the death of the defendant by the passing of the preliminary decree and the learned Chief Justice went on to say that this was so because "the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree". It is nowhere said that the proceedings which take place between the two decrees are not in the nature of a suit, nor of course is it suggested that all the matters in issue

17. (1903) I.L.R. 30 C. 609.
18. (1891) I.L.R. 19 C. 132 (F.B.).
19. (1895) I.L.R. 22 C. 425.
20. (1928) I.L.R. 51 M. 701: 55 M.L.J. 253 (F.B.).

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between the parties are finally disposed of by the preliminary decree. Indeed it may often happen that most of the contentious work has to be done after a preliminary decree has been passed, and has to be settled by the final decree. It may be observed that the learned referring Judges in that case assumed that the suit was still pending. In the Privy Council case *Lachmi Narain Marwari* v. *Balmakund Marwari*[21] cited in this judgment, a case which related to a dismissal for default of a partition suit after the preliminary decree, the simple principle laid down is that

"after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside."

I do not find, therefore, that this case is authority for the proposition for which it is cited.

It is clear to me that the suit continues for some purposes at least until the final decree; it would indeed be an anomaly if any decree could be reached by proceedings other than a suit. That being so, I have been shown no authority for the view that an application in a pending suit desiring the Court to proceed to judgment is governed by any rule of limitation. So far as the examples shown to me go, applications which are so governed will be found not to be of this character. In *Kalyani Pillai* v. *Thiruvenkadaswami Aiyangar*[22] the application was to bring on record the legal representatives of a respondent to a Privy Council appeal. *Mangamma Nayakuralu* v. *Ramadasappa Nayanimvary*[23] related to execution. *Swaminatha Pillai* v. *Rajagopala Mudaliar*[24] was an unusual case where a trustee who had brought a suit died and application was made to transpose a co-trustee defendant as plaintiff. It is difficult to say whether, in the interval between death and transposition, the suit could be held to be pending. The case in *Hindustan Bank* v. *Mehraj Din*[25] related to the Indian Companies Act. Indeed, the only case in point, *Srinivasa Mudaly* v. *Ramaswamy Mudaly*,[15] to which I have already referred, appears to me very good authority against the application of the Limitation Act.

I think, accordingly, that the learned Subordinate Judge is right in his view that no question of limitation arises, as well

15. (1915) M.W.N. 725.
21. (1924) L.R. 51 I.A. 321: I.L.R. 4 Pat. 61: 47 M.L.J. 441 (P.C.).
22. (1924) I.L.R. 47 M. 618: 47 M.L.J. 154.
23. (1924) 48 M.L.J. 563.
24. (1920) 40 M.L.J. 208.
25. (1920) I.L.R. 1 Lah. 187.

Ramanathan Chetty v. Alagappa Chetty.

as in the construction which he has placed upon the disputed passage in the decree. It is unnecessary for me to add therefore that, even had I felt less convinced of these propositions, I should much have doubted the desirableness of interfering in revision. The Civil Revision Petition is dismissed with costs.

B.V.V. *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Idara Pitchiah .. *Petitioner** (*4th Defendant*)

v.

Unde Rajaha Raje Sir Rajah Velugoti Sree Govinda Kristna Yachendra Varu Bahadur, Zamindar of Venkatagiri .. *Respondent* (*Plff.*).

Pitchiah v. Zamindar of Venkatagiri.

Easement—Zemindari's tank—Water of—Inamdars' user of—Acquisition by prescription of—Proof of—Civil Procedure Code, Order 41, Rule 4—Decree allowing suit against several defendants—Revision Petition against one of them only—Setting aside of the entire decree below in—Grounds.

In a suit by a Zemindar against several inamdars to recover compensation for the unauthorised use by the defendant of the water of the plaintiff's tank for the second crop on the defendants' inams, the plaintiff admitted the defendants' right to use the water of the tank for the first crop but denied their right for the second. *Held,* that the right admitted by the plaintiff and claimed by the defendant was one of easement and that as the evidence established the defendants' user of the water of the suit tank for raising a second crop for twenty years and more the defendants were entitled to an easement by prescriptive right.

Held further that as the whole decree was questioned in the revision petition and the finding of fact related to all the defendants the whole decree of the Court below against all the defendants should, under O. 41, R. 4, Civil Procedure Code, be set aside though the revision petition itself had been preferred by only one of them.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Kanigiri in S.C.S. No. 504 of 1926.

K. Kuppuswami Aiyar for petitioner.

A. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT.—This revision petition is against the decree passed by the District Munsif of Kanigiri in S. C. S. No. 504 of 1926. This Small Cause suit and a number of others were filed by the Raja of Venkata-

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*C.R.P. No. 674 of 1927. 4th April, 1928.

Pitchiah *v.* Zamindar of Venkatagiri.

giri against several inamdars to recover compensation for the alleged unauthorised use by the defendants of the water of the plaintiff's tank for the second crop on the defendants' inams. Such compensation was claimed in the shape of water rate or price for the use of water said to be unauthorisedly used.

The defendants are the inamdars. The plaintiff is the Zemindar. There is no privity of contract between the plaintiff and the defendants. It is admitted that the tank water which was said to be used by the défendants belongs to the plaintiff. If the defendants used the water of the tank without having a right to do so they would be committing trespass and would be legally liable to pay damages to the plaintiff. But the defendants say that they are entitled to use the water of the tank for their lands. The question therefore to be decided in the case is whether the defendants have any right to use the water of the plaintiff's tank for their lands.

Now the plaint admits that the defendants are entitled to use the water of the tank for the first crop but not for the second crop. The right so admitted by the plaintiff and claimed by the defendants, obviously is a right of easement. The only question is what is the extent of that right? Is it limited to the first crop or does it extend to the use of water for all the crops that can be raised by the cultivation of the inams so long as there is water in the tank? The District Munsif has found that there is no evidence on either side as to whether second crops were raised at the time of the grant. If the matter rests there, it would perhaps be a nice question of burden of proof on the pleadings. The District Munsif has considered other circumstances in the case. He first of all referred to the liability to pay water cess in Government villages. In this connection he referred to the Standing Order No. 64 of the Standing Orders of the Board of Revenue. The liability of the inamdars to pay water-rate to Government is governed by statute, namely, the Irrigation Cess Act (VII of 1865), and the non-liability to pay depends upon whether there is engagement to pay at the time of the grant within the meaning of Act VII of 1865. In deciding the case between the Zemindar and inamdars, I do not think we have anything to do with the Irrigation Cess Act or analogies based on it.

The District Munsif next refers to the decision in *The Midnapore Zamindary Co.* v. *Muthappudayan.*[1] That is a case

1. (1920) I.L.R. 44 M. 534: 40 M.L.J. 213.

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of landlord and tenant. The question in that case was whether the additional assessment can be claimed by a landlord in respect of a second crop of paddy raised with the landlord's water by the tenant on his wet holding and the decision of the point depended upon whether any usage disentitled the landlord to the same. It was held that the burden of proof was on the tenant. I do not think that case has anything to do with our case. At the same time I do not mean to decide any question of burden of proof and the Munsif has referred to that case merely for showing that the burden of proof is on the inamdar, just as it lay on the tenant in that case. I do not think it is necessary to decide the question of burden of proof in this case.

The next point that the District Munsif has adverted to is usage. He begins this portion of his judgment thus:

"As regards usage, it is admitted by the plaintiff's witness that second crop cist was never collected, or claimed by the plaintiff for inam wet lands before Fasli 1332. But *except as regards one land, Survey No.* 496-4, *the subject-matter of S. C. S. No.* 504 *of* 1926, there is no evidence as to how long there has been second crop cultivation on the lands. P.W. 2 is the karnam of the village."

He states in cross-examination:

"Second crop is being raised on the land comprised in S.C.S. No. 504 of 1926 every year for the last 20 years to my knowledge. Second crop was being raised on the other inams also now and then before Fasli 1332. Second crop cist was never claimed or collected for inam lands before Fasli 1332."

I may here observe that the District Munsif obviously accepts the Karnam's evidence. The District Munsif then says in his judgment:

"Only one witness has been examined on behalf of the defendants. He is the 4th defendant in S. C. S. No. 504 of 1926, and he speaks only about his land, *i.e.,* Survey No. 496-4. He deposes that second crop is being raised on that land for the last 25 years *to his knowledge.* He says that second crop was being raised on the land by his ancestors also but his evidence *in this respect* is at best hearsay and is therefore valueless."

Here I may observe that the District Munsif accepts the witness's evidence as to 25 years which is not hearsay but only rejects it for the period beyond it. This is also clear from the next sentence which runs thus:

"Assuming that second crop was being raised on the land for about 20 years before Fasli 1332, the mere abstention of the plaintiff from claiming water-rate during that period cannot disentitle him from claiming it now. The evidence is very meagre and insufficient to establish the alleged custom or usage."

This sentence shows that the District Munsif accepts not only the Karnam's evidence but the evidence of D.W. 1 relating to 25 years which is not hearsay, for only in this way can we

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have evidence for 20 years prior to Fasli 1332. As I already pointed out, the question in the case is not one of custom or usage but one of easement. If it is one of custom or usage, I am bound by the District Munsif's finding of fact. But 20 years' enjoyment of the water certainly makes out an easement by prescriptive right as enjoyment has gone up to the end of Fasli 1334 (*vide* plaint). It is unnecessary in this case to distinguish easement by grant and easement by prescription. The facts justify the finding of the easement by either method. Vide *Rajrup Koer* v. *Abdul Hossein.*[2] On the facts found by the District Munsif, the defendant in S.C.S. No. 504 of 1926 has established a right of easement to use the water of the plaintiff's tank for two crops. I may incidentally observe that the defendants in the other lands have not established such an easement. The result is while all the decisions of the District Munsif are correct, only the decision in this case is erroneous and has to be set aside.

Apparently the land Survey No. 496-4 belongs to defendants 1, 2 and 4. Anyhow the Karnam's evidence relates to all the lands comprised in S.C.S. No. 504 of 1926. Relying on O. 41, R. 4, Civil Procedure Code, that is on the ground that the whole decree is now questioned before me and that the finding of fact relates to all the defendants, I set aside the whole decree and dismiss the suit against all the defendants, with costs of the 4th defendant only throughout.

A.S.V. *Decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

The Public Prosecutor .. *Appellant**

v.

Polasanapalle Nagaraju and another .. *Accused.*

The Public Prosecutor v. Nagaraju.

Criminal Trial—Motive for a crime—Ignorance of law, if can be imputed to the accused by the Crown—Evidence Act, S. 114, Illustration (e)—Presumption of regularity in official acts—Confession placed on record by Magistrate—Duty of Sessions Judge to presume it was voluntarily made.

The Crown cannot impute ignorance of law as a motive for a crime and the accused person must be given the benefit of the assumption that he knows the law.

A Court should not disregard Section 114, Illustration (*e*) of the Evidence Act and assume irregularity in official acts. A Sessions Judge should

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*Cr. Appeal No. 615 of 1929. 13th December, 1929.

2. (1880) L.R. 7 I.A. 240: I.L.R. 6 C. 394 (P.C.).

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presume that a confessional statement placed on record by the Magistrate was voluntarily made.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Sessions Judge of East Godavari Division at Rajahmundry in Case No. 17 of 1929 on his file.

K. N. Ganapathi on behalf of the appellant.

The Court delivered the following

JUDGMENT.—(Appeal against an acquittal).

This tree of brothers and sisters gives the *personae dramatis.*

Sister
|
Accused 1
|
Daughter marries

Brother, Accused 2.
|
P. W. 2. — P. W. 3.
|
Brother — Brother — Chitti (Deceased) — Sister—wife of P.W. 14.

Chitti, the deceased, was 14 years old. On 17th December, 1928, his corpse was found in the yard of P.W. 5. The medical evidence shows that he was throttled.

He was seen on the evening of 16th December on the verandah of the house of accused 2 with the two accused and the sons of accused 2, P.Ws. 2 and 3.

On the 18th December, these two boys were arrested for the crime; and on 29th December, 1928, they "confessed"; that is to say, statements recorded from them under section 164 were treated as confessions, but their effect is to put the guilt upon the present accused and an oil-monger, and to exonerate the boys. In the committing Court they stood by these statements, and in the Sessions Court they resiled. The present application to admit this appeal is practically a prayer that these depositions and statements may be reconsidered by a Bench of this Court to see if they warrant the conviction of the two accused.

It is quite within the bounds of possibility that these two boys were the actual murderers, and there must have been some suspicion against them when the police investigated, else they would not have been arrested. It is then quite possible that they thought of saving their skins by putting the blame upon their father and cousin. Putting their evidence at its highest they are not very satisfactory witnesses, and it must be borne in mind that the one fact known about them beyond all doubt

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is that they have committed perjury, either at the trial or at the investigation. The problem then reduces itself to this simple question: Can two men be hanged on the suspect evidence of perjured witnesses? To that question the answer must be "No"; and in this case there is absolutely nothing besides that evidence. There is nothing unusual about Chitti being on his friend's verandah that night, and there is no motive for accused 1 and 2 to have committed the crime. The heirs of Chitti are his two sisters, and accused 1, who is the father of a brother's wife, cannot have any claim, and cannot, I should think, have supposed that he had any claim. The Crown cannot impute ignorance of law as a motive. In the famous case of *Rex* v. *Monson* [1] the Crown imputed as a motive that Monson's wife held a transfer of the murdered lad's life insurance policy, and Monson did not know that a minor cannot assign an imputation that was not accepted. An accused person must be given the benefit of the assumption that he knows the law.

The assessors are unanimously of opinion that the accused are guilty; but their opinion probably derives support from the popular instinct that after an atrocious murder some one should hang for the vindication of general morality. It is cases like this that illustrate the danger of the jury system. I do not think any Judge could come to an opinion contrary to that of the learned Judge who tried the case and, therefore, do not admit the appeal. The only exception I should take to his judgment is that in discussing the original confessions he seems rather to disregard section 114 (*e*) of the Evidence Act and to assume irregularity in official acts. He says that the bare certificate in Exhibits D and G does not prove that the statements were voluntarily made, which of course is strictly correct; but it may fairly be assumed that the Magistrate did his best to assure himself that the statements were voluntary, and if he had felt any suspicion he would have placed it upon record. Then he speaks of the best efforts of the Magistrate to remove police and other influences, as if police influence were necessarily bad. There is, so far as I know, nothing upon the record of this case which reflects upon the conduct of the police, and an assumption by the officers of one department that the officers of another department are naturally depraved is quite unwarranted and even offensive.

The appeal is dismissed.

N.S. *Appeal dismissed.*

1. (1903) 67 J.P. Jo. 267.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE PAKENHAM WALSH.

Pazhancheri Panangat Blahayil Karnavan Kunhunni Nair (dead) and another .. *Appellant* and his L. R. (Plaintiff and his L. R.)*

v.

Raman Menon .. *Respondent (1st Deft.).*

Kunhunni Nair *v.* Raman Menon.

Malabar Law—Melkanomdar redeeming kanomdar—Improvements by kanomdar—Melkanomdar if entitled to compensation—Malabar Compensation for Tenants Improvements Act (I of 1900), S. 5—"Predecessor-in-interest."

A Melkanomdar redeeming a kanomdar is entitled to claim, from the jenmi, compensation for improvements made by the latter. The expression "predecessor-in-interest" in S. 5 of the Malabar Compensation for Tenants Improvements Act means a person who claims title from any other by assignment, transfer, gift, etc.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Odgers in S.A. No. 945 of 1924 preferred against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A.S. No. 130 of 1923 preferred against the decree of the Court of the District Munsif of Chowghat in O.S. No. 843 of 1920.

K. P. M. Menon for appellant.

D. A. Krishna Wariar for respondent.

The judgment of the Court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—This is a Letters Patent Appeal against the decree of Mr. Justice Odgers dismissing Second Appeal No. 945 of 1924 with costs. The facts are shortly these: the plaintiff is the landlord, the defendant the tenant and the suit is to redeem the *kanom* for Rs. 200 evidenced by Exhibit A. The plaintiff gave the *kanom* to one Subramania Pattar and the matetrial terms of Exhibit A which is the *melkanom* in favour of the 1st defendant are that the *kanom* in favour of Subramania Pattar should be redeemed by the 1st defendant and that he should pay Rs. 200 towards the redemption of that *kanom*. As regards the value of improvements which Subramania Pattar was claiming or might claim, Exhibit A also says that the 1st defendant should pay for those improvements if necessary. The material clause is:

"I shall therefore pay up the *edukkudi* amount of Rs. 200 and also the value of the *kuzhikkurs* (improvements) effected in the schedule-

*L.P.A. No. 61 of 1926. 28th October, 1929.

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mentioned properties by the said Subramania Pattar, although there is no necessity to pay the value of the same as they were effected without your permission, the value being paid only to avoid litigation and trouble."

Then the clause proceeds:

"It has also been settled that, if Subramania Pattar does not take the *edukkudi* amount as mentioned above and surrender the schedule-mentioned properties the said amount shall be paid to you and you should pay off the *edukkudi* and recover possession of the properties for me, that you should directly recover the arrears of *michavaram* rent due from Subramania Pattar up to 1081 (1905-06) inclusive, and when the *panyam* amount and the value of *kuzhikkurs* that may be ascertained and estimated at the time of causing eviction, if *kuzhikkurs* are raised, are given, it has been agreed that the properties would be surrendered with the receipt that may be obtained from Subramania Pattar with the release deed and the document, etc."

This translation beginning "and when the *panyam* amount" was the translation made by the Bench Clerk as the parties were not agreed as to the accuracy of the translation made by the Court translator. The translation of Exhibit A as translated by the Court translator is:

"and that when the mortgage amount, Rs. 200, and, if any *kuzhikkur* value has been paid, that *kuzhikkur* value also as estimated at the time the property is recovered possession of is paid, the properties would be surrendered with an *Ozhimuri* (surrender deed), the receipt obtained from Subramania Pattar and this deed, etc."

It is not very material to consider this as the contingency contemplated did not arise. A suit was not filed by the Jenmi, the owner. What happened was that Subramania Pattar did not consent to redemption and a suit, No. 535 of 1906, had to be filed. Exhibit B is the decree in the suit. The suit is by the Jenmi as *pro forma* tenant and the other parties, interested to redeem the present respondent being the 3rd plaintiff. A decree was passed and under that decree plaintiffs 2 to 7 were directed to pay into Court the amount mentioned in the decree and the decree goes on to say that

"the defendants do deliver up to the said plaintiffs or to such persons as they may appoint in this behalf all documents in their possession or power relating to the plaint mortgaged properties."

Then the decree goes on to say that

"the defendants shall put the 3rd plaintiff into possession of items 12 and 13 of the mortgaged properties described in the schedule herewith annexed and that, if such payment be not made within the above period, the mortgaged properties be sold. It is further ordered and decreed that the 1st defendant is at liberty to remove his improvements on the said plaint items 12 and 13."

As regards the improvements what happened was that there were two Commissioners appointed. The first Commissioner valued the improvements at about Rs. 70 and odd, the second Commissioner valued them at Rs. 83. Subramania Pattar chose

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to remove the trees rather than receive compensation and that course was evidently agreed to by the parties interested. He did not remove the trees owing, according to him, to domestic calamities. Evidently he did not think it worth his while to do so. The improvements consequently stood on the land unpaid for. It is not disputed that the present respondent paid the Rs. 200 and redeemed Subramania Pattar and that he has been in possession ever since. The plaintiff now wants to redeem him and the question is whether the respondent can claim any compensation for improvements. It is contended by Mr. Menon for the appellant that Subramania Pattar did not take away the trees on the land as the 1st defendant did not pay Subramania Pattar anything for the improvements. The benefit of this conduct in not taking away the trees should enure to the *Jenmi* and not the defendant as he is only a *kanomdar*. This may be so if the law governing the case was the ordinary law of landlord and tenant or that of mortgagor and mortgagee but the question is how far the position of the parties is affected by the Malabar Tenants Improvements Act. The relevant sections for the purpose of this appeal are sections 5, 10 and 13.

Section 5 says:

"(1) Every tenant shall on ejectment be entitled to compensation for improvements which have been made by him, his predecessor-in-interest, or by any person not in occupation at the time of the ejectment who derived title from either of them and for which compensation has not already been paid; and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy or the payment or tender of the mortgage money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court.

(2) A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage as the case may be."

Section 10 relates to trees of spontaneous growth and says:

"When the improvement is not an improvement to which section 9 applies but consists of timber trees or of other useful trees or plants spontaneously grown during the period of the tenancy or sown or planted by any of the persons mentioned in S. 5, the compensation to be awarded shall be three-fourths of the sum which the trees or plants might reasonably be expected to realise if sold by public auction to be cut and carried away."

Section 13 refers to maintenance of trees and the cost of such maintenance. It says:

"When the improvement consists in the protection and maintenance of timber or fruit trees or of other useful trees or plants not sown or planted by any of the persons mentioned in section 5, or of such trees or plants spontaneously grown prior to the commencement of the tenancy, the compensation to be awarded shall be the proper cost of such protection and maintenance ascertained as provided in section 11."

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We think that it is unnecessary in this case to invoke the aid of provisions of sections 11 and 13, because it is nobody's case that the trees for which compensation is now claimed were of spontaneous growth. Both in the prior litigation and in this what was claimed was compensation for trees planted or improvements made by Subramania Pattar, the previous *kanomdar,* and we agree with Mr. Justice Odgers in thinking that it is not open now in second appeal to raise the question as to the nature of these improvements whether they were of spontaneous growth or whether they were trees planted. Throughout in all the Courts the case went on the footing that the improvements which were effected would come within the purview of section 5 and the question was who was entitled to the benefit of these trees. We think the question turns on the construction of the words in section 5 "predecessor-in-interest", whether it can be said that where one mortgagee redeems another, the latter can be said to be a predecessor-in-interest of the former within the meaning of section 5. If so, there can be no doubt that he is entitled to the benefit of the improvements. The argument of Mr. Menon is that in cases like this where the *jenmi* creates a *kanom* and a *melkanom* it cannot be said that the *kanomdar* is the predecessor-in-interest of the *melkanomdar* and therefore section 5 can have no application. For the respondent it is contended that these words are to be construed in a more liberal sense and that the succeeding *kanomdar* redeeming the predecessor must be taken to be his successor in interest and that he would be so in respect of all the rights and obligations under the previous *kanom.*

As regards the meaning of the expression "predecessor-in-interest" in section 5 we agree with the observations of Mr. Justice Sundara Aiyar in his "Malabar Law" that the words must be used not in a strict. sense. We agree with the following observation:

"The words cannot be said to adequately describe the class of persons for whose improvements the tenant in possession is entitled to claim compensation. Unless the word 'predecessor-in-interest' is understood in a somewhat loose way, the section may not include many cases which must obviously have been intended to come within it. The trouble arises, largely from the fact that in drafting this section sufficient attention was not paid to the fact that the definition of the word 'tenant' in the Act is so framed as to include very varying kinds of interest, such as mortgagee's and lessee's interests and even in (*sic*) cases where the occupant has no lawful title to possession."

Then the learned author goes on:

"In the case of a mortgagee paying off a previous mortgagee, the latter may be regarded as the predecessor-in-interest as under the law the

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subsequent mortgagee is subrogated to his rights. To cover obvious cases it may be necessary to understand the word 'predecessor-in-interest' as the derivation of the word suggests as meaning 'one that went before him in interest,' some 'tenant' as understood by the Act who preceded him in occupation either immediately or mediately through others without the continuity being broken up (*sic*) by the intervention of the plaintiff.' "

The cases reported in *Thekkamannengath Raman* alias *Kochu Poduval* v. *Kakkasseri Pazhiyot Manakkal Karnavan*[1] and *Thupran* v. *Mamad Kasim Sait*[2] support the view. The former was no doubt a case of compensation for trees of spontaneous growth but the observations at pages 194 and 195 apply equally to cases of compensation for trees planted and the reasoning of the learned Judges applies equally to those cases. In *Thupran* v. *Mamad Kasim Sait*[2] the learned Judges observe:

"It is immaterial whether the improvements were made by the 2nd defendant himself or by any other person in possession before him. It is quite sufficient if the improvements are on the land even if they are made by some previous occupant. It was not the case of either party that anybody but the 2nd defendant was in occupation at the time of the suit."

These decisions are authority for holding that the expression "predecessor-in-interest" has to be used not in a strict sense but as meaning a person who claims title from any other by assignment, transfer, gift, etc., and in claiming compensation we think that, where one *kanomdar* redeems the other, the latter should be treated for the purpose of section 5 as the predecessor-in-interest of the former. In the present case we see no reason why compensation should not be given as claimed by the respondent. We think the decision of the learned Judge is right and dismiss the Letters Patent Appeal with costs.

S.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Sind.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR LANCELOT SANDERSON.

Suleman and another .. *Appellants**

v.

Haji Abdul Latif and others .. *Respondents.*

P. C.

Suleman v. Haji Abdul Latif.

Partnership—Dissolution and accounts—Suit for—Overdrawings by partner—Interest on—Liability for—Amount found due from defendant to

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*P.C. Appeal No. 55 of 1929. 28th March, 1930.

1. (1915) 28 M.L.J. 184. 2. (1912) 17 I.C. 433.

P. C.

Suleman
v.
Haji Abdul
Latif.

plaintiff—Interest on—Plaintiff's right to, only from date of final decree—Value of goodwill of business to be brought into accounts—Share of partner—Concurrent findings as to—Privy Council's interference with.

The ordinary rule is that a partner is not charged with interest in respect of overdrawings.

In an action to dissolve and wind up the affairs of a partnership, it is impossible to say, until the accounts have been taken, what if anything is due from any partner to his co-partners. Accordingly, in such an action interest should only be allowed to the plaintiffs from the date of the final decree by which the amount (if any) is found due from the defendants to the plaintiffs.

In taking the accounts of a partnership the value of the goodwill must also be brought into the accounts.

Where one of the issues in a suit for dissolution of a partnership and for accounts was as to the share of the defendants in the partnership business, and there were concurrent findings of the Courts below on that issue, *held*, that there was no reason for departing from the ordinary rule of the Privy Council as to concurrent findings of fact.

Cross-appeal No. 55 of 1929 from an appellate decree of the Court of the Judicial Commissioner of Sind, dated the 13th June, 1927, which modified a decree of a Judge of that Court (in its District Court Jurisdiction), dated the 22nd December, 1925, in a suit for dissolution of partnership and rendition of accounts.

The material facts of the case appear sufficiently from their Lordships' judgment.

Dunne, K.C. and *Wallach* for appellants (defendants).

De Gruyther, K.C. and *Hyam* for respondents in the main appeal and appellants in the cross-appeal.

Dunne, K. C.—The Court was not entitled to allow interest to the plaintiffs from the date of suit till payment on the decretal amount found due to them. No interest from the date of suit was claimed by the plaintiffs in their plaint.

De Gruyther, K. C.—The Court of Appeal was right in allowing interest on the decretal amount from the date of the suit. In the circumstances of the case the plaintiffs were entitled to interest on the sums of money overdrawn by the defendants from time to time as from the date of such overdrafts.

[LORD RUSSELL.—But the ordinary rule is that a partner is not charged with interest on overdrawings: Lindley on Partnership, 9th Ed., p. 479.]

28th March, 1930. Their Lordships' judgment was delivered by

P. C.

Suleman *v.* Haji Abdul Latif.

Lord Russell.

LORD RUSSELL.—The action in which these appeals arise is a partnership action in which the plaintiffs claimed (*a*) a decree for dissolution, and (*b*) that the accounts of the partnership be taken. Other relief was claimed in the following terms: "(*c*) That sums found due to the plaintiffs by the defendants be ordered to be paid by them."

Up to a point the facts are not in dispute. The plaintiffs, or their predecessors-in-title, had for some years before 1902 carried on a business in Karachi, as partners, in the firm name of A. Haji Dossal & Sons. In the year 1902 the firm acquired a business of dealing in arms and ammunition, which originally belonged to one A. Haji Tar Mahomed and which in 1902 was being carried on by his son Haji Hamad. The firm having acquired the said business, carried it on as a branch or department of their general business which they continued to carry on in their firm name, A. Haji Dossal & Sons. At the time the arms and ammunition business was acquired, the defendants (who were relations of Haji Tar Mahomed and Haji Mahomed and had worked in that business) became associated with the firm, and so continued in association with the firm until the dissolution decreed in this action. It is at this point that the facts cease to be undisputed, the principal issue in the action being as to the position occupied by the defendants in relation to the arms and ammunition branch or department from 1902 onwards.

The contention of the plaintiffs was that from 1902 to 1907 the defendants were employed as paid servants of the firm, that from 1907 to 1911 they were partners in the business of the arms and ammunition branch or department with a 2 anna share on the profits and losses of the said business, and that from the beginning of 1912 onwards their share was increased to 4 annas. The defendants contended that they were partners throughout with a 2 anna share from 1902 to 1911, and an 8 anna share from the commencement of 1912 onwards.

The action was heard in the Court of the Judicial Commissioner of Sind, the Court having framed the following issues:—

"1. Is the suit not maintainable?

2. On what terms did the defendants work in the business from 1902 to 1907?

3. What shares did the defendants possess in the business in suit and for what periods?

4. To what amounts are the plaintiffs entitled on the accounts?"

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The first issue has become immaterial.

The Additional Judicial Commissioner delivered judgment on the 22nd December, 1925, his findings of fact on the second and third issues being in accordance with the contentions of the plaintiffs.

The preliminary decree under the seal of the Court is (so far as material) in the following terms:—

"It is ordered and decreed that the suit is maintainable and that the share of the defendants in the profits and losses were two annas from 1907 to 1912 and thereafter four annas up to 1922 when the defendants ceased to be active members in the firm.

It is further ordered that issue No. 4 be referred to Court Commissioner to take accounts and report within two months."

The reference of issue No. 4 to the Court Commissioner appears to their Lordships necessarily to involve the taking of the partnership accounts by that official in the manner customary when a partnership is dissolved by the Court.

In the course of his judgment the Additional Judicial Commissioner directed that the accounts should be taken from 1907, but that nothing was to be taken into account as regards goodwill. He made no provision as to costs, which he said would be provided for in the final order.

An appeal was presented against this preliminary decree, and judgment was delivered thereon by the Appellate Court on the 13th June, 1927. As regards the principal matter of dispute the Appellate Court used the following language:—

"After careful consideration of the evidence we have come to the conclusion that the findings on these issues should be that the defendants worked as servants from 1902 to 1907, and that they worked as 2 annas sharers from 1907 to 1911, and as 4 annas sharers from 1912 to 1922. . . The conclusion at which we arrive therefore is that the contention of the plaintiffs is correct and that all the conclusions at which the learned Additional Judicial Commissioner arrived as to the shares of the parties, for the reasons given by him in his judgment, are correct."

In addition to the principal issue between the parties the judgment of the Appellate Court dealt with certain subsidiary matters arising on the accounts. It was stated in the judgment (1) that the defendants should not be charged with interest on any drawings by them in excess of their 2 annas or 4 annas share; (2) that in ascertaining the profits of the partnership business nothing should be charged against revenue in respect of rent, light, municipal rates and the like; (3) that goodwill should be brought into account; and (4) that interest at 6 per cent was allowed to the plaintiffs "from the date of the plaint

on the decretal amount found due to them." As regards costs the Appellate Court, having regard to the special circumstances of the case, considered that each party should bear his own costs of all the proceedings up to that time.

The decree made on the appeal runs thus:

"It is ordered and decreed that the case should be sent back to Commissioner who should go into the question of goodwill and decide what the goodwill of the business amounted to and award to the defendants 4 annas share of that goodwill with interest from the date of the dissolution of the partnership and it is further ordered that the defendants are also entitled to 4 annas share of the assets of the firm at the date of the dissolution of the partnership with interest thereon."

"It is further ordered that each party should bear his own costs throughout."

The defendants have appealed to His Majesty in Council against that decree and complain of the findings as regards their shares in the partnership business and of the allowance of interest from the date of the plaint.

The plaintiffs have appealed by way of cross-appeal and complain of the disallowance of interest on the amounts overdrawn by the defendants and of the allowance to the defendants of a share in the goodwill of the partnership business or in the assets thereof.

Counsel for the plaintiffs in the course of the arguments before this Board also contended that in ascertaining the profits of the partnership business something should be charged against revenue in respect of rent, light, municipal rates and the like, but no such point is raised by their case on this appeal, and their Lordships are therefore of opinion that the instructions by the Appellate Court to the Commissioner in this respect must stand.

As regards the appeal of the defendants their Lordships find that upon the main contention between the parties there are separate findings of facts by two Courts, which findings are concurrent and adverse to the defendants, and that no reason can be suggested for departing from the ordinary rule applicable in such circumstances. The appeal must fail so far as it seeks to reverse or alter those findings. In regard to the statement in the Appellate Court judgment that interest was allowed to the plaintiffs from the date of the plaint on the decretal amount found due to them their Lordships are unable to accept the correctness of this view. This is not an action to recover some debt of which it can be said that it was due at the date of the plaint. It is an action to dissolve and wind up the

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affairs of a partnership; and until the accounts have been taken it is impossible to say what if anything is due from any partner to his co-partners. In their Lordships' opinion interest should only be allowed to the plaintiffs from the date of the final decree by which the amount (if any) is found due from the defendants to the plaintiffs.

As regards the cross-appeal their Lordships agree with the view of the Appellate Court that the defendants were at the date of dissolution entitled to a 4 annas share of the assets of the partnership firm, *i.e.*, the assets properly attributable to the arms and ammunition branch or department. Among these assets must necessarily be included the goodwill attaching to that branch or department, and the value thereof must be brought into the accounts. Their Lordships realise that in the peculiar circumstances of this case the value may not be either large or easy of ascertainment; but what amount should be included is a matter for the Court Commissioner to determine upon proper evidence.

Their Lordships also agree with the decision of the Appellate Court that the defendants are not chargeable with interest on overdrawings. No case is made out or even alleged against the defendants which would justify a departure from the ordinary rule that a partner is not charged with interest in respect of overdrawings.

The net result is that the defendants' appeal fails in so far as it seeks to vary the decree appealed from. It is true that it has resulted in obtaining a correction by this Board of the statement in the judgment of the Appellate Court as to the date from which interest should be allowed in favour of the plaintiffs in respect of any amount found due to them from the defendants, but that statement formed no part of the decree. The defendants' appeal upon the main dispute has failed. The plaintiffs' cross-appeal has also failed. As regards costs the Appellate Court in view of the special circumstances of the case exercised their discretion and imposed upon each party the liability to bear their own costs up to the date of the Appellate Court decree. Their Lordships see no reason for criticising or altering the order so made; indeed, they are of opinion that the example may well be followed on the present occasion and that the parties may be left to bear their respective costs of the appeal and cross-appeal.

Their Lordships have considered whether it is necessary or advisable to incorporate in any order to be made on these

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appeals any specific reference to the various matters of detail upon which they have indicated their views. They think such a proceeding is unnecessary. These matters of detail form no part of either of the decrees made in this action, and their Lordships feel no doubt that in taking the accounts and working out the rights of the parties, the judicial authorities in Sind will act in accordance with the views expressed in this judgment.

Their Lordships are accordingly of opinion and will humbly advise His Majesty that an order should be made dismissing the appeal and cross-appeal without costs.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Barrow, Rogers and Nevill.*

K.J.R. *Appeal and Cross-appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Commissioner's Court of Ashanti (Eastern Province).]

PRESENT:—LORD CHANCELLOR, VISCOUNT DUNEDIN, LORD DARLING, LORD ATKIN AND LORD THANKERTON.

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Benjamin
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Benjamin Knowles .. *Appellant**

v.

The King .. *Respondent.*

Privy Council—Criminal appeal—Function of Board in—Interference in —Grounds—Murder—Conviction for, without considering possibility of case being manslaughter—Quashing of conviction in case of—Jury trial—Practicability of—View of Court below as to—Interference with—Jury trial provided by statute—Trial without jury in case of—Interference on ground of—Special leave to appeal—Appeal brought up by—Function and jurisdiction of Board in—Ground on which special leave granted in fact non-existent.

The Privy Council do not sit as a Court of Criminal Appeal. To allow criminal proceedings to be reviewed there must have been "substantial and grave injustice done".

The trial against the law of a capital case without a jury is substantial injustice within the rule in *Dillet's* case[1], for the conviction in such a case will be conviction without jurisdiction, and special leave to appeal from such a conviction will be granted.

Once a Criminal Appeal is brought by special leave it is incumbent on their Lordships to examine the judgment as given, even if it appears that the ground on which special leave was granted does not in fact exist in the case. But even in such somewhat exceptional case, their Lordships are not sitting as an ordinary Criminal Court of Appeal in which case they would be entitled to consider what would have been their own verdict. Though the criterion is hardly as strict as it would have been on an application for leave based on the simple ground that the evidence did not

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*P.C. Appeal No. 54 of 1929. 10th March, 1930.

1. (1887) 12 A.C. 459.

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support the verdict, yet they must be satisfied "there is something which in the particular case deprives the accused of the substance of fair trial."

The question whether in a given case a jury trial is practicable or is permitted by local circumstances within the meaning of a statute is a matter to be determined by the local tribunal and not for the Board to form a conclusion upon. And where the local tribunal tries the case without a jury, the maxim *Omnia praesumuntur rite et solemniter acta* clearly applies to the case, and the Board will not interfere in criminal appeal with its judgment on the ground that its view was erroneous.

Where, in a capital case tried without a jury, the judgment of the Court below convicting the accused of murder appeared to be vitiated by the fact that the Judge considered that the only alternative to death by accident was murder and that he failed to consider the question as between manslaughter and murder, their Lordships felt themselves bound to consider whether the evidence had reached the standard of proof necessary to involve a conviction for murder, and, being of opinion that it did not, set aside the conviction.

Appeal No. 54 of 1929 by special leave from a judgment of the Chief Commissioner's Court of Ashanti (Eastern Province), dated 23rd November, 1928.

Pritt, K.C. and *Horace Douglas* for appellant.

The Attorney-General (*Sir William Jowitt, K.C.*) and *C. H. Pearson* for Crown.

10th March, 1930. Their Lordships' judgment was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—This appeal, for which special leave was granted by His Majesty in Council is against a conviction of the appellant for the murder of his wife, Mrs. Knowles, by the Acting Circuit Judge of Ashanti on the 23rd November, 1928. The case was tried by the Judge without a jury and the appellant was not allowed the assistance of either solicitor or counsel. The grounds of appeal are first, no jurisdiction, and second, that there was no evidence on which a conviction of murder could be maintained.

The Court of Ashanti by which the appellant was tried was established by the Ashanti Administration Ordinance No. 1 of 1902. The sections of the Ordinance, as amended by subsequent ordinances which bear on the method of trial in criminal cases are the following:—

Section 8.—"Where not otherwise provided by some other statute, ordinance, or other law for the time being in force in Ashanti, the Court shall in causes and matters brought or arising before it, be guided by the law in force in the Gold Coast Colony as set forth in sections 14—19 of the Supreme Court Ordinance of the said Colony."

Section 9.—"So far as it is practicable and local circumstances permit, the procedure in the Court, civil and criminal, shall be the same as the procedure in the Supreme Court of the Gold Coast Colony."

Section 10.—"In no cause or matter, civil or criminal, shall the employment of a Barrister or Solicitor be allowed."

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It is unnecessary to quote the various sections of the Acts which regulate procedure in the Gold Coast, as it is clear that if the trial had been in the Gold Coast it would have been imperative to have a jury for a capital case and the prisoner would, if he chose, have had the assistance of counsel and solicitor.

The appellant, therefore, contends that a jury for a capital case was a *sine qua non*, and that a conviction by a Judge sitting alone cannot stand.

The Attorney-General stated, and that it was not denied by the appellant, that as a matter of fact there never has been hitherto trial by jury in Ashanti.

Now the direction that in Ashanti the criminal procedure of the Gold Coast shall be the guide is not absolute, but is qualified by the provisions of section 9. If jury trial is not practicable, or not permitted by local circumstances, then the direction does not apply. Practicability and the state of local circumstances are questions which can only be determined in Ashanti on the spot. It is impossible for their Lordships of this Board to form a conclusion on such matters, and it is not for them to turn themselves into a local tribunal. They are of opinion that this is a matter to which the maxim *Omnia praesumuntur rite et solemniter acta* clearly applies, and they are, therefore, unable to sanction this ground of appeal.

Before dealing with the question of the evidence their Lordships think it necessary emphatically to repeat what has been said on many occasions, that they do not sit as a Court of Criminal Appeal. To allow criminal proceedings to be reviewed, to use the words of Lord Watson in *Dillet's* case [1] there must have been "substantial and grave injustice done". In the present case if it had turned out that it was against the law for a Judge to try a capital case without a jury, that would have been substantial injustice, for it would have been conviction without jurisdiction, and it was on that ground that leave of appeal was manifestly granted. But the case once brought up it is incumbent on their Lordships to examine the judgment as given. Even in this somewhat exceptional case, however, their Lordships are still not sitting as an ordinary criminal court of appeal in which case they would be entitled to consider what would have been their own verdict. Though the criterion is hardly as strict as it would have been on an application for leave based on the simple ground that the evidence did not support the verdict, yet they must be satisfied to use the words of Lord Sumner

1. (1887) 12 A.C. 459 at 467.

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in *Ibrahim* v. *The King*[2], "there is something which in the particular case deprives the accused of the substance of fair trial."

Now the facts of the case as proved are simple enough. The appellant and his wife were alone in their bedroom after luncheon. There had been guests at luncheon, and they had gone away shortly after 2 P.M. without anything noticeable having happened. Their native servants heard loud voices suggestive of quarrelling. The appellant and his wife it was proved lived generally on good, and, indeed, affectionate terms, but had occasional quarrels which were greatly induced by the fact that both the appellant and his wife were addicted to the taking of too much liquor, and the appellant drugs, and were often in a drunken or semi-drunken and dazed condition.

The evidence as to the time is confused and contradictory, but somewhere between 4 and 5 the native servants heard a shot and a cry. They were frightened and one of them ran off to the District Commissioner, who had been one of the guests at the luncheon and said what he had heard. The District Commissioner took his car and went off to the house of the accused, whom he saw, and asked if there had been an accident. The accused said it was all right. The District Commissioner then went away. The native servant went back again later and two hours later the District Commissioner wrote a note saying the native servants were very excited, and asking if he could be of any service. To this letter he got no reply. About the same time the native servant was called into the room and told to clean up a pool of blood. The accused said to his wife he would like to send her to the hospital. He then said he would go himself, and went. When he was gone the cook, by desire of Mrs. Knowles, lifted a revolver which was by the bed and put it into a box, locked it, and gave her the key. While clearing up the blood he picked up something which he did not recognise, but which was a revolver bullet.

That evening the accused got a sleeping draught containing morphia from the dispensary of the hospital. Next evening he got a repetition of the medicine and a hypodermic syringe with two ampoules of morphia. About 3 o'clock that day Dr. Gush, who lived at Kumasi, heard that something had happened and in consequence drove down to Bekwai, where the accused lived. He found the accused in a somewhat dazed condition

2. (1914) A.C. 599 at 615.

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and bearing signs of the results of alcohol and the drugs above referred to. The accused volunteered the information that there had been "a domestic fracas," and showed him his left leg covered with bruises which he said had been inflicted by his wife with an Indian club. He also said that she had been nagging him and he had said if she didn't stop he would put a bullet in her. Dr. Gush asked to see Mrs. Knowles, and heard her say she would like to see him. He then went into the bed-room with the accused and examined the wounds, which he found had been treated with iodine by the accused—a proper, though in the circumstances, scarcely a sufficient treatment. The wound was such a wound as would be inflicted by a revolver bullet. It was in a peculiar direction. The bullet had entered the left buttock and proceeded in an upward direction, and making its exit at the lower side of the abdomen on the right side, having, as was afterwards disclosed at a post-mortem, pierced the intestine, the bladder and the uterus. It was not bleeding directly when Dr. Gush saw it, but there was some blood coming from the vagina.

He asked Mrs. Knowles how the accident happened and she said she had been examining her husband's revolver which had been recently cleaned by the police, that she had put the revolver down on a chair, and shortly after sat upon it, that she tried to remove it from underneath her, but the open-work sleeve of her dress caught in the trigger and the revolver went off.

Dr. Gush said she must go to the hospital but had better have a bath first. He found the accused at the fire quite dazed. He went to fetch his car, and on coming back got the revolver from Mrs. Knowles, and found in it five cartridges and one empty shell. He noticed a hole in the mosquito net which covered the two beds. Mrs. Knowles died the next day, but before she died she made a dying declaration. This was to the same effect as to what she had said to Dr. Gush with two small differences. She mentioned that the revolver had been cleaned, but did not say "by the police," and she said that before it happened the boy had come in with afternoon tea. Other matters to be mentioned are that the mosquito net had several holes in it: that the accused said that on one occasion his wife had put a bullet past him while he was in bed; that another bullet was found by the police and certain marks on the furniture. Further, on the 22nd October the Acting and Assistant Commissioner of Police went to Bekwai and found the accused

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in bed lying in blood-stained sheets and having on blood-stained pyjamas. He was weak and ill, but they considered him rational. They told him that they were going to detain him on a charge of causing grievous bodily harm and that a dying declaration was to be taken from his wife. He then made several remarks, *viz.*: "I think she will roll up" (*i.e.*, die), "This is a bad business, I may go to prison," "If she rolls up I am afraid I am for it." He went with them to Kumasi, and in the Assistant Commissioner's bungalow, while the Acting Commissioner went for a warrant, he said, "I don't care what happens to me, I am worried about my wife," and then, "If my wife rolls up it means a murder case," and again, "If my wife rolls up I will be hung by the neck until I am dead."

Their Lordships must now examine the judgment. In the judgment of the Circuit Judge is to be found what to a jury would have been the summing up, and then the verdict. Now the Judge examines at great length the possibilities as to which bullet of the two bullets found, one of which had made dents in the furniture, was the bullet which caused the wound. Upon this question he comes to no certain conclusion, being oppressed by the difficulties as to either theory. In their Lordships' view this enquiry is quite by the mark. It is quite certain that the deceased was killed by a revolver bullet, and there being no certain evidence as to the position of the parties at the time, no conclusions can be drawn from the possible indicia as to the flight of the bullet. The Judge next takes up the story of the deceased as given in the evidence of Dr. Gush, and as given in the wife's dying declaration, and along with it the story as given by the prisoner himself when he gave evidence at the time. That story, abbreviated, is as follows: That he had had a quarrel with his wife about nothing, which ended, that he then went to bed to sleep, that he saw his wife come in and start to undress and afterwards went to sleep, that there was a shot fired which woke him, and he heard his wife say she had been shot, that he jumped up and said, "Show me, show me" (this was a remark heard by one of the servants behind the door), that he plugged the wound and put her to bed, and she said "People will think I have done this purposely," to which he replied she had only to lie quiet and he would take the blame. That he did not trouble about the District Commissioner's note, as being a medical man himself he had done what was needful and that he did not want her disturbed. That afternoon he took drink and drugs, and to use his own words,

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"I had the fixed idea of protecting my wife, and didn't realise until later that my statements were dangerous. I had an idea fixed that I would take any punishment if I could save my wife."

As regards the revolver he said that he usually kept it under his pillow fitted in a holster; that on this occasion he took it out of the holster, cocked it and laid it on the book case. The Judge then examines these accounts and finds them unsatisfactory. He is particularly pressed by the statement of Mrs. Knowles as to the servant bringing tea, which was not true, and he saw no reason for the appellant taking out the revolver and cocking it, and points out the discrepancy as to its place, the appellant saying it was on the book case, while Mrs. Knowles said it was on the chair. He lays stress on the various remarks made by the appellant after the event, which he considers were not made, except as to those on the 22nd when in a dazed condition. He thinks it proved that there was a domestic fracas, and considers the remark that he would put a bullet through his wife if she did not stop, very significant. He, therefore, comes to the conclusion that the wife's story was not true, and then he says, "Taken as above the evidence against the prisoner is overwhelming."

Now the learned Judge was entitled to draw his own conclusions as to whether Mrs. Knowles's account was true, and their Lordships, not being as above stated, an ordinary Court of Criminal Appeal, would not consider themselves entitled to set that aside upon the ground that they would come to a different conclusion on the facts as found. Having come to the conclusion that the story of an accident could not be substantiated, and the position and direction of the wound excluding all idea of deliberate self-infliction, he was driven to the conclusion that the shot was fired by the appellant. That there was criminality in what happened is a necessary result of that conclusion. In a fit of drunken recklessness to fire a shot to silence a nagging woman, which shot the woman, even though the shot was not intended to hit her, is a crime. But the fatal flaw in the judgment is that having set aside Mrs. Knowles's account of the occurrence as accident he at once assumed that the only alternative to accident is murder. There is not the slightest inquiry into whether assuming that the shot was fired by the accused, the act amounted to manslaughter and not murder. There is no attempt to face the question of whether the standard of proof required to prove murder as against manslaughter, has

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in this case been reached. If the case had been before a jury and the Judge had not explained to them the possibility of a verdict of manslaughter, but had said if not accident the only alternative is murder, that would have been an erroneous summing-up. That is what is to be found in the judgment. The question as between manslaughter and murder is entirely undealt with, and their Lordships are, therefore, as the learned Judge failed to consider the question, bound to consider whether the evidence here reached the standard of proof necessary to involve a conviction for murder. They are clearly of opinion that it did not. A conviction for manslaughter might have been a different matter, but that is not before their Lordships. They have therefore humbly advised His Majesty to quash the conviction.

Solicitors for appellant: *Wynne-Baxter & Keeble.*

Solicitor for respondent: *Burchells.*

K.J.R. *Conviction quashed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD ATKIN, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Mahant Bhagwanpuri .. *Appellant**

v.

The Secretary of State for India in Council and others .. *Respondents.*

P. C.

Mahant Bhagwanpuri v. The Secretary of State for India in Council.

Civil Procedure Code (*V of* 1908), *O.* 1, *R.* 8—*Applicability—Managers of religious association in possession through agents—Possession of property from—Suit for recovery of, by person with proprietary title.*

The Secretary of State sued to recover possession of certain lands from eight persons described as "all residents and Mahants of Juna Akhara." The Juna Akhara was an unregistered association of a considerable number of sadhus and at the date of suit the defendants were the managers of the institution and were, through their agents, in possession of the suit property. The main question in the case was whether the suit property was granted by the Crown to the Juna Akhara by a sanad. It was found that it was not, and that the proprietary title to the suit property was in the plaintiff.

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*P.C. Appeal No. 63 of 1929. Allahabad Appeal No. 30 of 1927. 14th February, 1930.

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Mahant Bhagwanpuri *v.* The Secretary of State for India in Council.

Held, on the above facts, that it was not necessary for the plaintiff to obtain leave under O. 1, R. 8 of Civil Procedure Code.

Appeal No. 63 of 1929 from a judgment and decree, dated the 3rd February, 1927, of the High Court, Allahabad, which affirmed a judgment and decree, dated the 31st January, 1923, of the Subordinate Judge of Saharanpur.

The main question for determination on the present appeal was whether or not certain plots of land situate within the limits of the Municipal Board of Hardwar were "nazul" or Crown lands.

On the 23rd September, 1921, the suit (out of which this appeal arose) was instituted by the Secretary of State for India in Council for the ejectment of the defendants describing them as "all residents and Mahants of Juna Akhara." No leave was prayed for or given as required under Order 1, Rule 8, Civil Procedure Code, 1908. The defendants filed their written statement of defence in which they pleaded, *inter alia,* that the suit was not maintainable against them by reason of Order 1, Rule 8, Civil Procedure Code.

It was established in evidence that the Juna Akhara was an unregistered association of a considerable number of Naga Sadhus and that the property of the Juna Akhara belonged to the *jamayat* (body of people) of the Akhara.

The Subordinate Judge delivered his judgment on the 31st January, 1923, allowing the plaintiff's claim. He held that the defendants could sue and be sued in their own names on the ground that "a shebait of a Mutt represents the property of the Mutt and can sue, and be sued in his own name."

Against the decree of the Trial Judge the defendants appealed to the High Court, contending that the Juna Akhara was not a Hindu Mutt and that the defendants not being shebaits, "the suit was vitiated by reason of the non-compliance of the mandatory provisions of Order 1, Rule 8, Civil Procedure Code." The learned Judges of the High Court, in overruling the defendants' contention as to the maintainability of the suit, said:

"If the defendants do not represent the Juna Akhara, it is difficult to understand why they should have taken the trouble of appealing to this Court. We have not the slightest doubt left in our mind that the eight defendants do represent and are the Mahants in office duly selected by the Juna Akhara. . . This appears to us to be a convincing proof of the defendants being still managers of the Hardwar properties of the Akhara."

In the result, the High Court dismissed the appeal, and the present appeal to His Majesty in Council was preferred by one of the defendants, the other defendants not joining with him being made *pro forma* respondents in the appeal.

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Mahant Bhagwanpuri *v.* The Secretary of State for India in Council.

Sir Lancelot Sanderson.

Dunne, K.C. and *Hyam* for appellant.

De Gruyther, K. C. and *Dube* for plaintiff-respondent, the Secretary of State for India, were not called upon.

14th February, 1930. Their Lordships' judgment was delivered by

SIR LANCELOT SANDERSON.—This is an appeal by Mahant Bhagwanpuri, who was one of eight defendants in a suit instituted by the Secretary of State for India in Council on the 23rd of September, 1921, against a decree of the High Court at Allahabad, dated the 3rd of February, 1927, which affirmed a decree of the Subordinate Judge of Saharanpur, dated the 31st of January, 1923.

The Secretary of State appeared as respondent to the appeal. The other seven defendants were added as respondents, but they were not represented at the hearing before the Board.

The suit was brought to recover possession of certain land specified in the plaint, which is situate at Hardwar, within the limits of the Municipal Board of the Hardwar Union.

The main question in dispute is whether the said land was granted by the Crown to an institution or association called the "Juna Akhara" by a *sanad,* dated the 10th of January, 1854.

Both the Courts in India have held that the said land was not so granted. There is no necessity to enquire into the history relating to the land in suit prior to 1854, for it was agreed at the hearing of the appeal that the above-mentioned main question depends upon the construction of the said *sanad* of the 10th of January, 1854. The terms of the *sanad* are as follows:—

"*Sanad* in favour of the Gosains of Juna Akhara, Hardwar.

"Pursuant to paragraph 4 of G.O. No. 907, dated the 6th of March, 1848, addressed to the Secretary, Board of Revenue, 1000 yards out of 10,455 cubic yards of land, named of Juna Akhara, was, as per enquiry made in 1848, found in your possession. Subsequently the objections were heard and a report was made in this case. In reply to that report the Commissioner sent his letter, No. 30, dated 6th December, 1853, along with other letters of the Board and the Government. It is written in it that this land is only one plot, that it measures 10,455 cubic yards, and that it is called by the name of Juna Akhara and the sitting place of the *Faqirs* who come here at the time of the *kumbh* fair. This plot has been relinquished in favour of the *jogis* in 1315 F. (?)

"Therefore, in accordance with paragraph 7 of the Commissioner's letter to the Sudder Board of Revenue, No. 197, dated 27th of May, 1853(?) which has been sanctioned by the Government—this *sanad* in respect of 10,455 cubic yards, is given in favour of the Juna Akhara. The object

of this *sanad* is that the Government has no more any claim in respect of the land and the Government has granted this land for the sitting place of the *Faqirs*. But without the sanction of the Government the *Goshains* will have no power to transfer it. No. of plot 175.

"*Name of house*.—Mandir Bhairosi, Mandir Mahadevi and Charan Badgats (?) situate at the Juna Akhara.

"*East—West*.—41 yards.

"*North—South*.—255 yards.

"*Area in cubic yards*.—10,455.

"*Approximate cost*.

"*Eastern Boundary*.—Bed of the river.

"*Western Boundary*.—Nuzul lands.

"*Southern Boundary*.—Mango and Gular trees.

"*Northern Boundary*.—Bed of the river, etc.

"Dated the 10th of January, 1854."

The word "cubic" is a mistake for "square"; this mistake is in itself obvious, but a reference to the list prepared by the Collector in 1848 shows that the plot mentioned in the *sanad*, *viz.*, plot 175, was 10,455 square yards.

It was admitted by the learned counsel for the appellant that the "Juna Akhara" is in possession of land measuring 10,455 square yards, and that the land claimed by the Secretary of State in this suit is no part of the said plot of 10,455 square yards, but is land lying outside the said plot.

It is to be noted that the above-mentioned terms of the *sanad* have been translated from the original.

In such translation the eastern boundary of the land granted thereby is stated to be "bed of the river," and the northern boundary "bed of the river, etc." The learned Judges of the High Court said that "much of the misunderstanding in this case was due to mistranslation of the boundaries given in the *sanad*," and they stated what, in their opinion, was the true translation as follows:—

"*East*.—Arazi Zer Dhank (land on the lower side of the pit).

"*West*.—Ditch and Nazul land.

"*South*.—Up to the Mango and Gular trees.

"*North*.—Dhank Khodana (a mound and pit)."

The learned counsel who appeared for the appellant did not dispute the correctness of the translation adopted by the High Court.

Consequently the description of the boundaries given by the learned Judges must be accepted by this Board.

That being so, the question now under consideration really becomes unarguable, for on reference to the plan which was

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before the High Court and this Board it is apparent that the boundaries given in the translation adopted by the High Court include plot 175 only, which is not in dispute in this suit, and do not include the land which is in dispute.

The title given by the *sanad*, therefore, is limited to plot 175 and the 10,455 square yards therein mentioned, and does not extend to the lands claimed by the Secretary of State in this suit.

Inasmuch as the appellant's appeal in relation to this part of the case was based on the construction of the *sanad*, their Lordships are of opinion that the decision of the High Court in respect thereof was correct.

A further point was taken by the learned counsel for the appellant. It is of a technical nature and has no relation to the merits of the case. It was argued that the defendants were not the proper parties to the suit and that no leave was asked for or obtained from the Court as required under Order 1, Rule 8 of the Civil Procedure Code, 1908.

It appears that the defendants were elected managers by the *akhara* at the *kumbh* in Hardwar in 1915, and on the 9th of May, 1915, a power-of-attorney was given by them to four persons, of whom Hardayalgirji was one, to act as their general attorneys, and among other matters to file suits, to set up a defence and affix their signature to a written statement, and it was further provided that all such proceedings taken by the said *muktars* should be admitted and accepted as having been done by the defendants personally in the capacity of *mahants*.

Hardayalgirji gave evidence for the defendants to the effect that there was a *kumbh* every three years at different places, Hardwar, Prayagraj, Nasik and Ujjain, and that different *mahants* were elected at each successive *kumbh* at the four places to officiate for three years. He, however, made certain material admissions in cross-examination, and the result was that there were concurrent findings of fact by both the Courts in India to the effect that the power-of-attorney had not been withdrawn, and that Hardayalgirji was actually managing the *akhara* properties by virtue of the said power-of attorney executed by the defendants and was looking after the *akhara* litigation, and that the defendants were still managers of the Hardwar properties of the *akhara*.

Their Lordships are of opinion that there was ample evidence to justify the above-mentioned concurrent findings of

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the Courts in India, and they see no ground for disturbing such findings. Their Lordships agree with the finding of the High Court that the proprietary title to the lands in suit is in the plaintiff, and they are of opinion that the defendants, through their agents, were in possession of the said lands at the time when the suit was instituted, and that they were rightly joined as parties to the suit.

Order 1, Rule 8 contains provisions which enable the Court to grant the permission therein mentioned in a case which comes within the scope of the rule; but, having regard to the facts of this case, their Lordships are of opinion that it was not necessary for the plaintiff to have recourse to the said rule.

The decree of the Trial Court was that the plaintiff be, on dispossession of the defendants, put in possession of the property in dispute, and that the map attached to the plaint should form part of the decree.

This was confirmed by the High Court. Their Lordships are of opinion that the decree of the High Court was correct, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitor for respondent (Secretary of State): *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

Note.—A petition for re-hearing of the appeal was dismissed by the Board on the 27th March, 1930.—K.J.R.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE REILLY.

Marivada Veeranna, minor, by mother and guardian Mahalakshmi and others .. *Appellants** (*Defendants* 5 *and* 7 *to* 9)

v.

Vytla Seetanna, late a minor, by mother and next friend Ramanamma, but since declared a major —*vide* Order on C.M.P. No. 1191 of 1927, and others .. *Respondents* (*Plaintiff and Defendants* 35 *to* 41, 48 *to* 54 *and* 59 *to* 65).

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Hindu Law—Widow—Compromise of bona fide *claim—Binding nature —Surrender—Reservation of a small portion for maintenance—Surrender*

*Appeals Nos. 309 and 310 of 1924. 19th March, 1929.

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and gift for life, distinction between—Principle of effacement—Death of surrenderee in widow's life-time—Widow's rights, if revived—Compromise by father—Release of family interest in property—Liability of father's share.

A settlement of family disputes between the widow and a claimant to the estate which took place more than forty years prior to suit and has not been questioned till the date of suit, must be held to be a settlement of *bona fide* family disputes binding on the estate, in the absence of anything in the evidence available to suggest the contrary.

Per Reilly, J.—"I do not agree with the suggestion made at one stage of the arguments that because there was this dispute so long ago there is a presumption that it was a *bona fide* dispute. In such a case, the circumstances must be examined so far as evidence regarding them is available."

If the person putting forward a claim to the estate, believed in good faith that he had some right in the family properties, whether that claim was valid in law or not, and the dispute between him and the widow was compromised with the aid of mediators, that compromise is binding on the reversioners.

Kondama Naicker v. *Kandasami Goundar,* (1923) L.R. 51 I.A. 145: I.L.R. 47 M. 181: 46 M.L.J. 172 (P.C.); *Gunjeshwar Kunwar* v. *Durga Prashad Singh,* (1917) L.R. 44 I.A. 229: I.L.R. 45 C. 17: 34 M.L.J. 1 (P.C.) distinguished,

The reservation of a small portion of the property for the maintenance of the widow does not affect the validity of the surrender.

Bhagwat Koer v. *Dhanukdhari Prashad Singh,* (1919) L.R. 46 I.A. 259: I.L.R. 47 C. 466: 37 M.L.J. 513 (P.C.) relied on.

A gift for the daughter's life with reverter to the widow is possible; but it would have to be clearly so expressed.

But the operation of a surrender is to efface the widow completely so far as the estate is concerned, so that her right is not revived by the death, during her life-time, of her daughter to whom she had surrendered her estate but the estate devolves in favour of the next reversioner and the succession cannot be interrupted by the mere fact that the widow is still alive.

Sartaji v. *Ramjas,* (1923) I.L.R. 46 A. 59 referred to.

A compromise entered into by the father as manager of the family consisting of himself and his sons, by which the father released substantial portions of the family property, is not binding even on the father's share, when it is not shown that the alienation was for necessity or for any other purpose binding on the estate. The equity recognised in favour of the alienee arises only when a decree is passed; it does not follow that the Court will enforce such a compromise before the equity has in fact arisen.

Venkata Row v. *Tuljaram Row,* (1921) L.R. 49 I.A. 91: I.L.R. 45 M. 298: 43 M.L.J. 298 (P.C.) relied on.

Appeals against the decree of the Court of the Additional Subordinate Judge of Cocanada, dated 15th November, 1923, in O.S. No. 63 of 1921.

The Advocate-General and *A. Satyanarayana* for appellants.

S. Varadachariar and *C. Rama Rao* for respondents.

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The Court delivered the following

JUDGMENTS. *Phillips, J.*—These are appeals against the decree in O.S. No. 63 of 1921 on the file of the Additional Subordinate Judge's Court of Cocanada, by which the plaintiff as reversioner has been given a decree for recovery of certain properties belonging originally to one Tiruppayya, the last male owner. The facts of the case are somewhat complicated and are as follows:—

Tiruppayya was the son of one Dorayya who died a very long time ago, the exact date being unknown. Dorayya had a sister, Venkamma, who was widowed at an early age and went to live with her brother. Subsequently Ammanna, son of another sister, was taken in by Venkamma and was afterwards described as her foster-son. This Ammanna married Dorayya's daughter, Ademma, and lived in his father-in-law's house. Venkamma was apparently managing the family affairs while Tiruppayya was young, and Ammanna was also assisting in the cultivation of lands, etc. After Tiruppayya's death in 1880, there was a mediation between Tiruppayya's widow, Venkataramanamma, and Ammanna, and the award of the mediators, Exhibit I, decided that Venkataramanamma and Ammanna should take the moveable and immoveable properties of the family in equal shares. In 1888, Venkataramanamma executed a document Exhibit VIII (*a*) in favour of Ammanna by which she gave up to him a half of the family properties. On the same day she executed another document, Exhibit VIII, in favour of her daughter Nagayya whereby she transferred the other half of the family properties to her daughter, reserving for herself 6 acres 42 cents of land which should be "under her so long as she lived." Nagayya died about 1904. After her death the properties transferred to her seem to have been enjoyed by her minor daughter, her husband Munnayya and Venkataramanamma. On Munnayya's death he left a will bequeathing some of these properties to a relation and there was a suit between that legatee and Venkataramanamma and Papamma, Munnayya's widow, which was compromised, and in accordance with the compromise the lands were divided between the parties. Venkataramanamma died in August, 1921, and this suit was filed in the following October by the plaintiff as the next reversioner of Tiruppayya.

The questions for consideration are:—

(1) Whether the settlement of 1880 was valid and binding on the estate.

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(2) Whether the gift to Nagayya in 1888 was a surrender of the widow's interest in the estate.

(3) Who succeeded to the property on the death of Nagayya? and

(4) Whether the compromise entered into during the pendency of this suit between the plaintiff and defendants 1, 2 and 3 is binding on the defendants.

On the first point it has to be determined whether the compromise of 1880 was in settlement of *bona fide* family disputes or whether it was a mere alienation by the widow which was not binding on the estate. The case of the first defendant, who is the son of Ammanna, is that his father was the *illatom* son-in-law of Dorayya and as such was entitled to a share in the family property and that the compromise was arranged in settlement of his claim. The Subordinate Judge has found that Ammanna was not the *illatom* son-in-law of Dorayya and certainly the evidence adduced to prove the *illatom* transaction is inadequate. This is not surprising considering the very long time that has elapsed since those events took place. It is certainly true that Ammanna married Dorayya's daughter and came to live in his father-in-law's house. Whether it was before or after the death of his father-in-law is not certain as the evidence on the point is very conflicting. In any event, he seems to have been treated as one of the family, for he gave up his rights in his natural family and looked after the affairs of Dorayya's family helping his aunt and foster-mother Venkamma. It has also been shown by the plaintiff's own witnesses that Dorayya became divided from his brothers and that his estate was considerably augmented by the exertions and care of Venkamma. It is not clear whether she applied any of her own money towards these acquisitions or whether it was merely her care and attention that increased the family properties. On this point it is impossible to secure any definite evidence after the lapse of at least 60 years. We have these facts which support the theory that it was intended to introduce Ammanna into the family as the *illatom* son-in-law. We also have the fact that Venkamma was in possession and urged her claim to some of the family properties and her claim must be deemed to be the claim of Ammanna, for it was as her foster-son that Ammanna put forward his claim before the mediators. The mediation was quite open and in settlement of disputes between the parties as admitted by the plaintiff's own witnesses. It took place more than 40 years before the suit was filed and has not been questioned till now, when it is very difficult to ascertain accurately details of the dispute and the grounds on which Ammanna put forward his claim. In view of the circumstances which we do

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know, and of the fact that the transaction has been unquestioned for over 40 years, I think it must be held that Ammanna had a *bona fide* claim and this settlement, therefore, was a settlement of *bona fide* family disputes and would, therefore, be binding on the estate which was represented by the widow in that dispute.

It is contended by Mr. Varadachariar for the respondents (1) that the so-called award, Exhibit I, is merely a division of the properties and not an award in settlement of disputes, (2) that Ammanna had no legal title to the properties when he put forward his claim and that, therefore, the compromise is invalid so far as the estate is concerned. The first contention must clearly be negatived for the plaintiff's own witnesses admit that the mediators settled all the disputes between Ammanna and Venkataramanamma, and, if the award were merely a partition of the properties between them which had already been arranged, we should have expected to find a partition of the properties by metes and bounds. It is clearly not such a partition for there is a recital in the document, "the parties having had disputes in the division of moveable and immoveable property they owned . . . . the mediators decided as follows:—" and what follows is consistent with a definite settlement of the claims of the respective parties but not with a mere partition by metes and bounds.

As regards the second contention, Mr. Varadachariar relies on the decisions of the Privy Council in *Kondama Naicker* v. *Kandasami Goundar*[1] and *Gunjeshwar Kunwar* v. *Durga Prashad Singh*,[2] but in these cases the claimant knew that the title he put forward was an untrue one and it was consequently held that the compromise of the claim was not one that would bind the estate. The real question is whether the dispute is a *bona fide* dispute and these cases are merely authority for holding that if the dispute is not *bona fide,* it is not binding on the reversion. In the present case I have discussed the circumstances and come to the conclusion that Ammanna did put forward a *bona fide* claim, believing that he had some right in the family properties. Whether that claim was valid in law or not (and after this long interval it would be very difficult to elicit the facts necessary for deciding such a matter) is not material, for if the claim of Ammanna was put forward in good faith and had some foundation, and the dispute between him

1. (1923) L.R. 51 I.A. 145: I.L.R. 47 M. 181: 46 M.L.J. 172 (P.C.).
2. (1917) 44 I.A. 229: I.L.R. 45 C. 17: 34 M.L.J. 1 (P.C.).

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and the widow was compromised with the aid of mediators, that compromise is binding on the reversioners.

This compromise being valid, the transfer of the remaining properties by the widow to her daughter Nagayya amounted to a transfer of the whole estate remaining to her. The reservation of 6 and odd acres for the widow's enjoyment is a small reservation for her maintenance and does not affect the validity of the surrender which otherwise included the whole estate. Mr. Varadachariar has sought to draw a subtle distinction between a gift by the widow of the whole estate to her daughter and a surrender of the same, his contention being that Exhibit VIII was only a gift for the daughter's life and that the property would revert to the donor on the daughter's death. It is possible that such a gift might be made, but it would have to be clearly so expressed. A surrender is tantamount to a gift and may be effected either by gift or by relinquishment of rights. The widow's gift was to the next reversioner and must be deemed to be a surrender of the widow's whole estate. The reservation of some immoveable property for her own enjoyment during her life-time does not invalidate the surrender. For this we have the authority of the Privy Council in *Bhagwat Koer* v. *Dhanukdhari Prashad Singh.*[3]

The next question for consideration is, who became entitled to the properties enjoyed by Nagayya on her death. It is contended for the respondents that when Nagayya died those properties would devolve on the heir of the deceased Tiruppayya and that therefore as his widow was then alive she would again succeed to the properties. It has, however, been held that when a widow surrenders her estate she effaces herself so far as that estate is concerned and the estate of the deceased husband is opened to his next heirs at that date, or to put it in the language of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden*[4]

> "It is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date."

It is not said that the effacement amounts to civil death and that the widow is, therefore, incapable of holding any property at all, for that would be inconsistent with the reservation of any property for her maintenance or with her ability to hold moveable property after surrendering immoveable property,

3. (1919) L.R. 46 I.A. 259: I.L.R. 47 C. 466: 37 M.L.J. 513 (P.C.).
4. (1918) L.R. 46 I.A. 72: I.L.R. 42 M. 523 at 532: 36 M.L.J. 493 (P.C.).

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which has been held to be possible under another system of Hindu Law. If the widow is effaced so far as the estate is concerned, there is no ground for holding that her right is revived by the death of her daughter during her life-time. The effacement is made in order to accelerate succession to her husband's estate. On the surrender, therefore, the next heir takes the property and when that heir dies, the devolution must continue in favour of the next reversioner and the succession cannot be interrupted by the mere fact that the widow is still alive. After the daughter, the deceased's estate must go to the next reversioner and it cannot be contended that the widow is in any sense a reversioner. To allow her, therefore, to revive the rights which she has deliberately surrendered would be to retard succession rather than to accelerate it. There is only one direct authority on this point and that is *Sartaji* v. *Ramjas*[5], where it was held that upon the death of the daughter the rights to the property vested in the next reversioner to her father and not in her mother. On Nagayya's death, therefore, the right to succeed to the property devolved on the plaintiff as the next reversioner and his suit in respect of that property is barred by limitation as being brought more than 12 years after the daughter's death.

A further contention is raised that in respect of the 6 and odd acres left in the widow's possession, the plaintiff's right to sue for possession did not accrue until after the widow's death. Undoubtedly he could not sue for physical possession, for this provision for maintenance was binding on the estate and, therefore, was binding upon the plaintiff when he became entitled to that estate; but, although he could not get physical possession, yet he could ask for symbolical possession, namely, such possession as was capable of being given, but this is in effect really a declaration that he is entitled to the property. He is not bound to bring such a suit, but can wait until the widow's death and then bring a suit for actual possession to which he would then be entitled. Plaintiff's claim in respect of the acres 6, cents 42 is not barred by limitation.

The next point relates to the compromise entered into between the plaintiff through his guardian and the 1st defendant for himself and as guardian of defendants 2 and 3. Under Order 32, Rule 7, a guardian cannot enter into a compromise of a suit on behalf of a minor except with the permission of the Court. In this case leave to compromise was not granted. The

5. (1923) I.L.R. 46 A. 59.

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compromise, therefore, is certainly not binding on defendants 2 and 3 and must be set aside so far as they are concerned.

The more difficult question is whether that compromise is binding on the 1st defendant so far as his share of the family property of himself and defendants 2 and 3 is concerned. The same question was under consideration by the Privy Council in *Venkata Row* v. *Tuljaram Row*.[6] I am unable to distinguish this case from that. In that case a father entered into a compromise on behalf of his minor son whereby he gave up his right under certain decrees in favour of the other party and it was held that not only was the compromise not binding on the minor son but that it was not binding on the share of the father. The reason given for this decision is at page 306:

"Rajaram Row, unless he was attempting to divide the joint family, could only deal with this property with the consent of his son or in his capacity as manager of the estate. In his capacity as manager of the estate he was only able to deal with it for certain limited purposes, and none of those purposes are, or can be, suggested as the consideration why these considerable sums were released. It follows, therefore, that the attempt to alienate, or to release, from the estate these substantial portions of the joint family property failed, and that there was no efficacy given to the arrangement that was then contemplated."

The only difference between that case and the present is that there the property was money due under decrees and here it is immoveable property. It has not been shown that the alienation of this immoveable property was for necessity or for any other purpose binding upon the sons. The compromise did not purport to alienate the father's share alone but the whole of the family interest in the property. It would, therefore, not be binding on the family. Although in somewhat similar circumstances, when such an alienation has been effected, the Court will enforce an equity in favour of the alienee to the extent of the alienor's share, it does not follow that the Court will enforce such a compromise before the equity has in fact arisen. It is only when the decree is passed that such an equity can arise and, therefore, the Court should refuse to validate a transaction which would necessitate a further equitable relief to one of the parties. The compromise is, therefore, not binding on any of the defendants 1 to 3 and the decree passed in accordance therewith must be set aside. The compromise relates to the properties obtained by the 1st defendant's father in 1880 or 1888 and the plaintiff's right to recover them has been held above not to exist.

6. (1921) L.R. 49 I.A. 91: I.L.R. 45 M. 298: 43 M.L.J. 298 (P.C.).

In the result both the appeals must be allowed and the plaintiff's suit dismissed so far as these appeals are concerned except in respect of acres 6, cents 42, in Appeal No. 309. Each party will pay and receive proportionate costs.

Reilly, J.

Appeal No. 310 *of* 1924. *Reilly.*—In this case the appellants are defendants 1—3, the successors-in-title of Ammanna, to whom Venkataramanamma gave up half the property standing in the name of her deceased husband Tiruppayya. In my opinion we should certainly not be justified in differing from the finding of the learned Subordinate Judge that the story that Ammanna was adopted as *illatom* son-in-law of Dorayya is untrue. Six witnesses for the plaintiff have given evidence that it was only after Dorayya's death that his daughter Ademma was married to Ammanna. On the other side we have the evidence of D.Ws. 3, 4 and 9. D.W. 3 says that the marriage was before the death of Dorayya, and his evidence implies that he was present at it, though he does not say so explicitly. In examination-in-chief he states that Ammanna was taken as Dorayya's *illatom* son-in-law; but in cross-examination it appears that he was only told of this by his father-in-law. He is under obligations to defendant 1, and the Subordinate Judge does not regard his evidence as of any value. D.W. 4 says that Dorayya brought Ammanna from his native village and that Ammanna lived with Dorayya both before and after his marriage; but he gives no evidence that there was any *illatom* adoption. D.W. 9 speaks of Ammanna as *illatom* son-in-law of Dorayya but admits that he knows nothing personally about the adoption. When this is the state of the oral evidence, the facts that in Exs. I, I-B and VIII-A there is no mention of Ammanna being *illatom* son-in-law of Dorayya and that on the contrary in Ex. I he is described as the adopted son of Venkamma and in Ex. I-B as her foster-son are ample basis for the finding that the story of an *illatom* adoption is an after-thought. No reasonable explanation why Ammanna was not described as *illatom* son-in-law of Dorayya in those documents, if he was so, has been suggested. If that were the basis of his claim, it would almost certainly have been put in the forefront instead of being altogether forgotten. And, if the Subordinate Judge was right, as in my opinion he was, in rejecting the story of an *illatom* adoption, he was clearly wrong in finding that Venkataramanamma gave half of Tiruppayya's property to Ammanna because Tiruppayya had directed her orally to do so. That Tiruppayya gave such a direction in respect of his property is recited in

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Ex. VIII-A, which was executed 8 years after Exs. I and I-B; but it was not put forward by defendants 1—3 in their written statements as a basis for their claim. Indeed they could not put it forward, as, if the story of an *illatom* adoption was true, then Ammanna was entitled to half of the family property and that half was not Tiruppayya's to dispose of. I agree with Mr. Varadachariar that it was not open to the Subordinate Judge to set up a case for defendants 1—3, not only not set up by them, but contradictory to and destructive of the case with which they came to Court.

But it was pleaded by defendants 1—3 that after Tiruppayya's death there were disputes between his widow Venkataramanamma and Ammanna and that those disputes were settled by mediators, in accordance with whose award the property in question in this appeal was allotted to Ammanna. I am not prepared to dissent from my learned brother's view that this can be regarded as a settlement of a *bona fide* family dispute, which should not now be upset. I do not agree with the suggestion made at one stage of the arguments that because there was this dispute so long ago there is a presumption that it was a *bona fide* dispute. In such a case the circumstances must be examined so far as evidence regarding them is available. When we find on the one side Tiruppayya's elderly aunt, Venkamma, who had been managing the household for years, and Ammanna, then a middle-aged man, whom this aunt had brought up and who had been attending to the cultivation of the family land, and on the other side Venkataramanamma, a young widow, whose husband had died 2 years after their marriage, there is certainly no presumption that any claim to the family property put forward by Venkamma and Ammanna, who were in such a dominating position, was made in good faith. It was an occasion on which a young widow might easily have been overborne and have been unable to assert her rights effectively. In such a case it is the duty of the Court to investigate the circumstances as carefully as possible and to beware lest an unrighteous claim is accepted as having been made in good faith merely because it is ancient history. But in his reply the learned Advocate-General has drawn our attention to evidence which makes it probable that Ammanna had an honest basis for his claim. P.W. 8 says that, when Ammanna joined Dorayya's family, with whom it is not now disputed he lived for many years, he left his own family property to his brothers. P.W. 2, Dorayya's niece, says that when Dorayya was divided from his

brothers, he got 8 acres of land; but, when Tiruppayya died, the extent of the family property had increased to about 44 acres. P.W. 2 also says that her aunt Venkamma managed the household and after Tiruppayya's death asserted that she had acquired most of the family property and insisted that some of it should be given to Ammanna, which was the origin of the dispute between Venkataramanamma and Ammanna. P.W. 4 also says that Venkamma objected to Venkataramanamma conveying Tiruppayya's property to her daughter because Venkamma had acquired some of the property, and so half was allotted to Venkamma and enjoyed by Ammanna. This is evidence given by the plaintiff's witnesses. It appears probable that the large increase in the family property was due to the good management of Venkamma assisted by Ammanna. When we remember that Ammanna had left his own family and abandoned his claim to a share in their property and that the division recorded in Exhibit I, by which Ammanna got half the property standing in Tiruppayya's name, was settled by mediators of other families, I think there is as much evidence as can reasonably be required at this distance of time to show that Ammanna had a moral claim, which he and Venkamma urged in good faith, and that the settlement of the dispute so caused was a proper and honest family settlement, which should not now be disturbed.

In this appeal the only remaining question is, whether the compromise between the plaintiff and defendants 1—3, on which the Subordinate Judge based his decree, can be upheld to any extent. As it was not sanctioned by the Court it is ineffective against the minors, defendants 2 and 3. It is urged for the plaintiff that the compromise is binding on the defendant 1's share of the property in the possession of defendants 1—3, which share would not fall far short of the 8 acres to be given to the plaintiff under the compromise. But I agree that even in respect of the share of defendant 1 the compromise cannot be enforced by the plaintiff. If the compromise fails in part, then the whole contract falls through. Defendant 1 did not bargain to transfer the whole of his share of the property in dispute in order that the shares of defendants 2 and 3 should be saved. As my learned brother has pointed out, this transaction is not similar to one in which an alienee from a manager of joint family property for valuable consideration not binding on the family is allowed to enforce his claim against the manager's share. That is done because the manager has received

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consideration and must make good his alienation so far as it is within his individual power. But here defendant 1 did not get the consideration for which he bargained. Indeed the compromise being invalid against the plaintiff, who, like defendants 2 and 3, was a minor, cannot be regarded as any consideration at all. And the decision of the Privy Council in *Venkata Row* v. *Tuljaram Row*[6] is against the contention of the plaintiff.

I agree that the appeal must be allowed with costs in both Courts.

Appeal No. 309 *of* 1924.—This appeal relates to the other half of Tiruppayya's property, which Venkataramanamma gave up to her daughter, Nagayya, by Ex. VIII. I agree that that transaction must be regarded as a surrender of the widow's interest to her daughter. That the document is in the form of a deed of gift is of no importance. Nor does the reservation of 6.42 acres for her life appear to me to be more than a reservation for maintenance—and not an excessive reservation—though maintenance is not mentioned in the document. When we are examining what purports to be a surrender by a Hindu widow to the next male reversioner, we have to assure ourselves that it is a real surrender and not a devise either to divide the property with him explicitly or by means of some undisclosed consideration or to insure the succession of a particular reversioner for reasons of partiality. But, when the surrender is to the widow's daughter, who in the great majority of cases is likely to outlive the widow and whose immediate succession is not likely to affect the ultimate devolution of the property to one male reversioner rather than another, it is unnecessary to scrutinize the surrender with suspicion so long as in effect the widow's estate is wiped out but for a reasonable provision for her maintenance. That appears to have been the effect of Exhibit VIII. Its language, which is that of an absolute gift, is not strictly suitable to a surrender. Nor it is suitable to a transfer of the widow's interest for the life of the daughter with a reversion to the widow if she survived the daughter. The only reasonable construction of its absolute terms, considering the person in whose favour it was executed, is in my opinion that the widow surrendered her widow's interest and stepping aside let in her daughter. That being so, when, as it happened, the daughter died before the widow, I cannot accept either of Mr. Varadachariar's suggestions for bringing the pro-

6. (1921) L.R. 49 I.A. 91: I.L.R. 45 M. 298: 43 M.L.J. 298 (P.C.).

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perty back again to widow—that she succeeded her daughter as heir or that she again came in as the widow of Tiruppayya, the last male owner. Either suggestion is inconsistent with the theory of a widow's effacement. When once a widow has effaced herself, has stepped aside and has surrendered her widow's estate in favour of a male or female reversioner, I do not see how that widow's estate can ever be revived. See *Sartaji* v. *Ramjas.*[5]

The right of the plaintiff's predecessor to possession began when Nagayya died, and for the property which went to her under Ex. VIII, except the 6.42 acres reserved for Venkataramanamma, his claim is clearly time-barred. But for possession of the 6.42 acres reserved for Venkataramanamma time did not begin to run against the plaintiff or his predecessor from Nagayya's death. Certainly, so long as Venkataramanamma was in possession, no reversioner had a right to possession, and so time could not begin to run against him. In respect of the 6.42 acres the plaintiff's suit is in time.

I agree, therefore, that this appeal must be allowed except in respect of the 6.42 acres and that the parties should pay and receive proportionate costs in both Courts.

S.R. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRIAR AND MR. JUSTICE PAKENHAM WALSH.

Rajah Somasekhara Royal and others .. *Appellants**
(*Defendants* 4, 6 *and* 2)

v.

Rajah Sugutoor Immadi Mahadeva Royal Yesavanta Bahadur and others .. *Respondents*
(*Plaintiff and Defts.* 3 *and* 5).

Somasekhara Royal *v.* Mahadeva Royal.

Lingayats of North Canara—Law applicable—Adoption of married man—Validity—Proof of custom.

Lingayats are bound by Hindu Law except in so far as it is modified by custom. Thus in the case of Lingayats governed by the law of the Madras Presidency the adoption of a married man is invalid. A person who sets up a custom to the contrary has to prove it.

Held, on the evidence in the case, that such a custom was not proved.

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*Appeal No. 354 of 1926. 5th December, 1929.

5. (1923) I.L.R. 46 A. 59.

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In the absence of proof that in any particular case parties have changed their personal law, Lingayats of North Canara continue to be governed by the law of the Madras Presidency and the Mayukha law has no application to them even though the District of North Canara has been transferred to the Bombay Presidency for administrative purposes.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor in O.S. No. 14 of 1919.

S. Varadachariar, P. Kameswara Rao and *E. Krishnamurthi* for appellants.

The Advocate-General (A. Krishnaswami Aiyar) and *B. C. Seshachala Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—Defendants 2, 4 and 6 are the appellants and the facts which led up to this appeal are as follows:—

The parties to the suit who belong to the Lingayat community are members of the Punganur Zemindar's family. Punganur was permanently settled in 1861. It is an impartible estate governed by the law of primogeniture.

On the 22nd of December, 1896, the then Zemindar, Raja Immadi Sankara Royal Yasavanta Bahadur, executed a will marked as Exhibit Y in the case. It recites that he transferred the estate to his eldest son Raja Immadi Veera Basava Chikka Royal Varu, and that he the eldest son should be the head of the Samasthanam and after him his eldest son and so on in succession. After giving certain directions and after giving certain legacies, he gave monthly allowances to his second and third sons.

[After referring to the terms of the will and subsequent legal proceedings their Lordships proceeded as follows:—]

The upshot of these proceedings was that the plaintiff and his descendants were to get Rs. 100 a month as Thevvajji or allowance as provided for in the will of his father and that in lieu of the lands referred to in the will and the decree of the District Judge giving him lands of the value of Rs. 35,950 he was to get a sum of Rs. 125 a month.

The decree of the High Court was in 1906. About September, 1907, the 1st plaintiff and his mother went to North Canara and were staying in the house of one Subhadrammayi, who was a relation of the 1st plaintiff's mother and, according to the appellants, the 1st plaintiff was taken in adoption by that lady and a regular deed of adoption (Exhibit 17) was executed and registered, the 1st plaintiff himself presenting it for registration. Exhibit 17 is a registration copy of the deed of

adoption. It is executed by Subhadrammayi, who was the widow of one Basavalinga Raja of Biligi, Siddapur Taluk, in favour of the 1st plaintiff, who is the 1st respondent before us. It recites that the 1st respondent was taken in adoption. This document was executed in North Canara, and it is not disputed that the properties which are referred to in this document as having passed to the adopted son are situate in North Canara. Though the factum of the adoption seems to have been disputed in the Lower Court, the Judge finds that the adoption was made in fact. We shall assume without deciding the point that the adoption was as a matter of fact made. Its validity, however, is disputed on the ground that the 1st respondent the adopted son was then a married man and that consequently the adoption is invalid. And in fact the whole of this appeal practically turns on the invalidity of the adoption owing to the adopted son being a married man at the time of adoption.

Though the 1st plaintiff was taken in adoption by the deed, dated the 19th of September, 1907, the parties seem to have changed their minds probably because the Biligi Samasthanam did not turn out to be as valuable as it was supposed to be.

In 1908 the 1st plaintiff and his mother again went to Biligi, and a release deed Exhibit CC, dated the 28th of November, 1908, was executed by the 1st plaintiff the adopted son in favour of the adoptive mother. The deed states that when the 1st plaintiff and his mother went to see the waterfall during the Bhadrapada month of the Plavanga year, the adoptive mother learning of the arrival of the son (1st plaintiff) and the mother sent for them and on account of the old relationship and on account of "emotion'' executed a document on 13th Bhadrapada, Suddha corresponding to 19th September, 1907 and had it registered and that the 1st plaintiff and his mother went away to their native place Punganur. It states that nothing took place according to the usage and law as stated in the document, that the adoptive mother herself has been managing the properties and that the climate of Biligi does not suit the 1st plaintiff. It winds up by saying "we with your consent have hereby relinquished to you our ownership, etc., rights passed to us under the aforesaid document." Then the property is described.

In 1912, *i.e.,* about 5 years after the adoption and 4 years after the relinquishment, the 1st plaintiff filed a suit (O.S. No. 46 of 1912) for arrears of maintenance. The plaint in that suit is marked as Ex. C. It sets out the rajinama already

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referred to giving him Rs. 100 a month for allowance and Rs. 125 a month in respect of the lands relinquished and claimed Rs. 6,695-13-4 after giving credit for the amounts the 1st plaintiff had received. In the meantime the Zemindar of Punganur who was a party to the agreement died and his son was brought in as the defendant. He filed a written statement stating that the agreement made by his father was not binding on him and setting up various other defences. His defence was not accepted and a decree for the arrears of maintenance was passed. In that suit there was no defence raised that the plaintiff having been adopted into another family ceased to be entitled to any maintenance even if the agreement of compromise giving him the rights claimed was valid and binding on the defendant. There was an appeal (No. 325 of 1913) against this decree, but it was dismissed by the High Court. The decree was executed and the plaintiff got his money.

Suit No. 14 of 1919 out of which the present appeal (No. 354 of 1926) arises was filed on the 1st of March, 1919, by the 1st plaintiff to whom under the rajinama Rs. 100 a month for allowance and Rs. 125 in respect of lands was agreed to be paid and by the widow of the late Zemindar who claimed Rs. 40 a month payable to her. The amount claimed was for the period subsequent to the period covered by the previous suit for the recovery of arrears of maintenance which was decreed. There were various defences raised, but the main defence with which we are concerned in this appeal is that the plaintiff having been adopted by the Rani of Biligi is not entitled to claim anything from the Zemindar either under the deed of Rajinama arrangement or otherwise. To this the answer was that there was no adoption as a matter of fact and secondly, the adoption even if it was true is invalid in law because the 1st plaintiff was at the date of the adoption a married man about 23 years of age.

The suit was originally laid against the 1st defendant only, the Zemindar, but pending the suit he died and defendants 2 to 6 were brought on record as his legal representatives and they adopted the written statement of the 1st defendant. A plea was raised by the 4th defendant that the maintenance should be reduced to Rs. 70 and Rs. 75 as the income of the estate had considerably fallen.

The Subordinate Judge decreed the plaintiff's suit. As regards the factum of adoption he held that the adoption was in fact made. He was of opinion that evidence oral and documentary in support of the factum of adoption amply supported

the factum of adoption. As in our view the adoption even if true is invalid it is unnecessary to give a finding on this point.

As regards the validity of the adoption, two questions arise, namely, (1) whether the plaintiff was married at the time of the adoption, and (2) whether the adoption of a married man among Lingayats is valid.

It is admitted that the 1st plaintiff was a married man at the time of the adoption. The parties are Lingayats and the question is whether the adoption of a married man by a Lingayat is valid.

The Subordinate Judge held that as the adoptive mother belongs to North Canara which was part of the Madras Presidency before it was transferred to the Bombay Presidency in 1861, the law applicable to the parties is the law as applied in the Madras Presidency, that as the adoption of a married man has been held to be invalid, the 1st plaintiff's adoption was invalid and inoperative and that he, therefore, remained a member of his natural family and was entitled to the rights conferred on him by the Rajinama.

North Canara originally formed part of the dominion of Hyder Ali and his son Tippu, who were the Rulers of Mysore, and in 1799, on the fall of Tippu Sultan, North Canara and other territories were ceded to the East India Company and formed part of the Madras Presidency till 1861, when for administrative purposes the administration of that district was transferred to the Bombay Presidency.

So far as the Presidency of Madras is concerned the law has always been that the adoption of a married man is invalid. The latest decision of this Court is *Lingayya Chetty* v. *Chengalammal.*[1]

Except in the Bombay Presidency where the Mayukha prevails, it has been held by the Courts in all the provinces in India that the adoption of a married man even though he happens to be a Sudra is invalid. The decisions are referred to in *Lingayya Chetty* v. *Chengalammal.*[1] It is argued for the appellants that the decisions to the effect that in the case of Sudras the adoption of a married man is invalid are wrong. We see no reason to differ from the current of authority which so far as we can see is uniform and is also supported by the Smriti Chandrika and other texts.

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1. (1924) I.L.R. 48 M. 407: 47 M.L.J. 776.

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So far as the Bombay Presidency is concerned, in places where the Mayukha is followed as the paramount authority, it has been held that the adoption of a married man is valid. We may refer to *Kalgavda Tavanappa* v. *Somappa Tamangavda*[2] and *Manikbai* v. *Gokuldas*.[3] This is not by reason of any custom in derogation of the law but by reason of the express text of the Mayukha to the effect that a married man may be adopted.

It is argued for the appellants that as North Canara has been incorporated in the Bombay Presidency from 1861, the law as administered in the Bombay Presidency should be the law to be administered to Lingayats in the Bombay Presidency where the adoption of married men has been held to be valid. An alternative ground has been taken that among the Lingayats, wherever they are, whether in the Madras Presidency or the Bombay Presidency, the adoption of a married man is valid by custom, that evidence of such a custom has been adduced in this case and that the Judge was wrong in holding that the custom has not been proved.

When the North Canara District formed part of the Madras Presidency, the law as administered by the Madras High Court was that the adoption of married men was invalid; and it would have been necessary for a person there who sets up a custom to the contrary to prove it. The transfer of North Canara to the Bombay Presidency for administrative purposes would not by itself change the personal law of persons residing in the North Canara District. Whether it is a case of an individual migrating from one province to another or a case of territory where he resides being transferred from one province to another, the presumption until the contrary is shown is that he carries his personal law with him, and it is difficult to see how the Mayukha can be said to apply to the North Canara District, simply because it was transferred to the Bombay Presidency. We may in this connection refer to *Huro Pershad Roy* v. *Shibo Shunkuree Chowdhrain*[4] and *Balwant Rao* v. *Baji Rao*.[5]

Turning to the custom set up, the custom alleged is a custom among the Lingayat community to which the parties belong, permitting the adoption of married men. It is a general

2. (1909) I.L.R. 33 B. 669. 3. (1924) I.L.R. 49 B. 520.
4. (1870) 13 W.R. 47.
5. (1920) L.R. 47 I.A. 213: I.L.R. 48 C. 30: 39 M.L.J. 166 (P.C.).

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custom alleged that Lingayats, wherever they are, are permitted to make adoptions of married men.

Before dealing with this question it is necessary to refer shortly to the Lingayat community. The Lingayats who were originally Hindus are a body of dissenters and the founder of their religion was one Basava who was born about 1100 A.D. Their religion is correctly summarised by Thurston in his Castes and Tribes of Southern India, Vol. IV, at page 236 as follows:—

"Their religion is a simple one. They acknowledge only one God, Siva, and reject the other two persons of the Hindu Triad. They reverence the Vedas, but disregard the later commentaries on which the Brahmins rely. Their faith purports to be the primitive Hindu faith, cleared of all priestly mysticism. They deny the supremacy of Brahmins, and pretend to be free from caste distinctions, though at the present day caste is in fact observed amongst them. They declare that there is no need for sacrifices, penances, pilgrimages or fasts. The cardinal principle of the faith is an unquestioning belief in the efficacy of the Lingam, the Image which has always been regarded as symbolical of the God Siva."

Mysore, the Southern Mahratta country and the Bellary District contain most of these Lingayats. Though the sacred thread is not worn by the Lingayats, a ceremony called Deeksha ought to be performed about their 8th year, but as in the case of Upanayanam it is often performed much later. The sacred mantra is whispered in the ear by their Guru and this ceremony corresponds to Upanayanam among the Brahmins. We may also refer to *Virasangappa* v. *Rudrappa*[6], where some of the Lingayat tenets are set out.

It is conceded in this case that so far as their religious duties are concerned, the Lingayats have got Agamas or sacred books which are of primary authority. One of such books is Vathulagama which has been filed as Exhibit Q in this case. It deals with adoption. These Agamas are dialogues between Siva their chief God and his consort Parvathi. As regards adoption this is what it states:

"The wise should take a boy possessing all the limbs, clean, endowed with beauty, born of the same gotra, having a liking to good conduct, aged five years excluding the eldest, of good conduct, highly intelligent, of sweet speech, tender hearted."

So far as the age limit is concerned, this age corresponds with the age given in Dattaka Chandrika. As regards the ceremonies of adoption which appear after this passage, homam is performed with Vedic mantras. As regards the age of five years, custom has relaxed that rule and the evidence of the

6. (1885) I.L.R. 8 M. 440.

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plaintiffs' witnesses in this case is that adoption can be made before the Deeksha ceremony is performed. The question, however, is whether custom has relaxed the rule that an adoption cannot be made after a person is married.

In the case of Jains it is undoubted law that in the absence of any custom to the contrary which has to be set up and proved, they are subject to the rules of Hindu Law. We may refer to *Gettappa* v. *Eramma*[7] where the authorities are collected. The Jains do not worship Siva nor do they recognise the authority of the Vedas. But in the case of Lingayats whose only God is Siva and who acknowledge the authority of the Vedas they are all the more bound by Hindu law except in so far as it is modified by custom.

As regards the evidence of custom the Subordinate Judge is of opinion that the custom has not been made out. The custom pleaded, as said before, is a general custom among the Lingayats and not a special or local custom in North Canara, or in the family of the adoptive mother. A large number of Lingayats are found in the Mysore Province, Bellary, and the Southern Mahratta country. The Zemindari of Punganur is on the borders of the Mysore Province. So far as the Mysore Province is concerned, it has been held by the Chief Court of Mysore that the adoption of a married Lingayat is invalid. The judgment of the Chief Court is marked as Exhibit WW in this suit. The learned Judges of the Chief Court observed:

"It is, however, desirable to say a few words on the validity of Kariappa's adoption which is referred to in the first and second grounds of appeal. It is found that Kariappa was married but the Courts have held that it was not a disqualification as he was a widower at the time of his adoption by the 1st defendant. The parties are Lingayats. Even if it be held that the law governing Sudras applied to them, according to Mr. Mayne, 'as regards Sudras, adoption could be performed effectually till marriage.' And in another place he quotes the Pandit's opinion that the period fixed for adoption is 'with respect to Sudras, prior to their contracting marriage,' page 178 (6th Edition). *See* also reference at page 179 to the case of *Papamma* v. *Appa Rau*.[8] Though there is no express authority on the point, having regard to the fact that the questions of age, marriage, etc., are determined in the texts on the consideration of certain rites, such as Upanayanam, marriage, etc., having to be performed to the individual to be adopted in the adopted family, there is strong reason for holding that marriage is a bar in spite of the fact that the person concerned was a widower at the time of adoption."

So far as Bellary which is part of the Madras Presidency is concerned, we have not been referred to any decision where

7. (1926) I.L.R. 50 M. 228: 51 M.L.J. 757.
8. (1893) I.L.R. 16 M. 384 at 396: 3 M.L.J. 80.

the adoption of a married man among the Lingayats in Bellary was upheld. As North Canara was part of Mysore and Madras Presidency, at least for 80 years, the presumption is that the rules as to adoption which are prevalent in the other parts of the Presidency and which are based on the Smritis are current in this Presidency and Mysore.

Though the Lingayats in the Vathulagama which, as the witnesses state, is binding on the Lingayats, fixed the fifth year as the proper age for a boy to be adopted, and though amongst the Lingayats and other communities adoption may by custom take place at a later age, there is no reason to suppose that there is a custom among the Lingayats in the Madras Presidency or in Mysore or in North Canara which was part of the Madras Presidency and Mysore, to so extend the age as to render valid by custom the adoption of a married man. It has, therefore, to be proved that in North Canara, where the adoption took place and the adoptive mother was living, there was a custom among the Lingayats by which the adoption of a married man was legal.

So far as the plaintiffs' witnesses are concerned, their evidence is that such an adoption is not valid, but the defendants' witnesses speak to instances of adoptions of married men and those witnesses are defendants' 1st, 2nd, 4th, 5th, 8th to 15th and 21st witnesses. The difficulty in the case of some of these witnesses is that there is nothing to test their general statement that the adoption they speak to was that of a married man. There must have been deeds of adoption but no deeds are produced and such deeds, if the adopted boy was a major, would disclose the fact, as there would be no guardian mentioned and generally it may be taken that any boy over 18 would be married. The cross-examination of some of the witnesses when they speak of the man adopted being married shows that they have no conception of the years which they were speaking of.

The Subordinate Judge deals with the evidence of the witnesses in detail in paragraph 33 onwards of his judgment and it is not necessary for us again to refer in detail to it. He observes in conclusion:

"I have shown that the evidence adduced to establish the custom alleged is not convincing nor clear. The custom has not obtained any judicial recognition so far either in Bombay or in Madras. In Bombay adoptions of married men have obtained judicial sanction, not because they are customary but because the Mayukha law approves of their validity. In the Mysore Province, such adoptions have been declared invalid by the Mysore Chief Court."

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We agree with the Subordinate Judge that as a custom it has not been proved. In this view, it is unnecessary to consider the argument of the learned Advocate-General that as the adopted son, *i.e.*, the 1st plaintiff, was a resident of Punganur in the Madras Presidency, it is his personal law that should govern the adoption, and that even if the adoptive mother belonged to North Canara and the custom as to adoption was proved, the adoption would still be invalid. It is also unnecessary to consider the argument that the defence based on the validity of the adoption is *res judicata* by reason of the fact that it was not set up in the previous suit for recovery of arrears upon the agreement now sued on, as the knowledge of the defendant would not affect the question of *res judicata*, or the further question that even if the adoption is valid, the rights created by the agreement could still be enforced. As regards the questions raised in the Memorandum of Objections as to the amounts payable under the agreement being payable to the plaintiff's descendants also, we think it unnecessary to express any opinion and leave the question open. As regards claims of hunting and forest rights, it is conceded that plaintiff will be entitled to them under the agreement. Plaintiff will be entitled to interest at 6 per cent. on the amount claimed from date of suit to date of payment. No order as to costs on Memorandum.

We think the Subordinate Judge was right in holding that the custom as to the validity of the adoption of a married man has not been proved. The 1st plaintiff, therefore, continues to be a member of the Punganur family and the agreement entered into is enforceable by him.

We think the decision of the Subordinate Judge is right and dismiss the appeal with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE CORNISH.

C. Meenambal Ammal .. *Appellant** (*Respondent*)

v.

Aburubammal .. *Respondent* (*Plaintiff-Applicant*).

Meenambal Ammal v. Aburubammal

Hindu Law—Widow—Suit on promissory note executed by widow—Consent decree charging one of the properties in her possession with the

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* O.S.A. No. 57 of 1929. 3rd December, 1929.

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payment of the decree amount—Subsequent surrender of that property and other properties comprising her husband's estate to the next reversioner—Alienation of the charged property by the reversioner to a stranger—Subsequent death of widow—Application by decree-holder to execute the decree and sell the charged property—Objection by the purchaser that the charge did not persist after the death of the widow—Onus of proof on the decree-holder—Duty of executing Court to decide the question—Right of decree-holder to rents and profits of the property charged till the widow's death—Validity of the widow's surrender—Right of the purchaser to insist on the transfer after the reversion fell in on the death of the widow—Transfer of Property Act, S. 43.

In a suit upon a promissory note executed by a Hindu widow, a consent decree was passed by which the decree amount was made a charge upon one of the properties in her possession in which she held a widow's estate. Subsequently, she surrendered her interest in that property and in her husband's estate to her husband's reversioners who later on sold that property to a stranger who took possession of it. The widow died afterwards and the decree-holder applied to execute the decree and recover the amount by selling that property. The purchaser in possession raised the objection that the charge did not persist after the death of the widow.

Held:—(1) that the *onus* was on the decree-holder to show that the charge was created for necessity legally sufficient to give it effect on the husband's estate after the widow's death or at least to show that the decree-holder took the charge in good faith that it was of that nature after making reasonable inquiries,

(2) that, as the decree-holder brought the purchaser of the property from the reversioner as the legal representative of the widow and the purchaser denied that she was the legal representative, that question must be decided by the executing Court by going into the question whether the widow created the charge validly so as to make it persist after her death,

(3) that the decision of this question by the executing Court did not amount to going behind the decree but only to construing the decree, and

(4) that the decree-holder was not entitled to recover the rents and profits of the properties charged up to the date of the widow's death as the charge gave only a right to recover the debt by sale of the property.

Obiter (by *Reilly, J.*) :—A Hindu widow cannot, by surrendering her widow's interest in her husband's property to her husband's reversioners, defeat the charge which had been created on the property by a consent decree against her.

Where a Hindu reversioner professed to be the owner of the property on the ground that the reversion had fallen in to him by means of a surrender by the widow, and as such to sell his ownership right to a stranger, and the surrender is invalid in law, the purchaser can call upon the reversioner to make good the transfer, if the reversion falls in to him on the death of the widow, under section 43 of the Transfer of Property Act.

On appeal from the judgment of the Hon'ble Mr. Justice Beasley (now Chief Justice), dated 28th March, 1929 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in E.P. No. 148 of 1928 in C.S. No. 758 of 1924.

K. S. Krishnaswami Aiyangar and *N. C. Vijiaraghavachariar* for appellant.

K. Ramanatha Shenai for respondent.

Meenambal Ammal v. Aburubammal

Reilly, J.

The Court delivered the following

JUDGMENTS. *Reilly, J.*—This appeal is against an order made by the learned Chief Justice as Mr. Justice Beasley in execution proceedings. In November, 1921, one Thayammal, who was the widow of Munuswami Mudali, with her brother Kanniappa Mudali jointly executed two promissory notes in favour of Aburubammal, who is the respondent before us. Kanniappa Mudali became an insolvent, and Aburubammal brought a suit against Thayammal on the notes. That suit was compromised in April, 1925; and on the basis of the compromise a consent decree was made, under which Thayammal had to pay Rs. 1,750 in instalments and the whole amount was made a charge upon a house in Madras called "Ganesa Vilas". In December, 1925, Thayammal surrendered her interest in that property and in her husband's estate to his reversioners; and they a month or so later sold the house to Meenambal, who is the appellant before us. In June, 1926, Thayammal died; and the execution petition with which we are concerned was put in on the 30th March, 1928. At one stage it was asserted by Aburubammal that this house, "Ganesa Vilas," was the absolute property of Thayammal; but it has been admitted before us that Thayammal got it from her husband, whose property it was. How after being her husband's property it became her absolute property there is no evidence, and it has not been explained to us. Before Mr. Justice Beasley the whole case proceeded on the assumption that Thayammal had only a widow's interest in this house; and in the circumstances we also must proceed on that assumption. Mr. Justice Beasley eventually made an order that Aburubammal was permitted to execute the decree against the assets of Thayammal in Meenambal's hands and that the house should be sold in execution of the decree. It is against that order that Meenambal appeals.

It has been admitted before us that Meenambal has had nothing to do with any assets of Thayammal other than this house; and it is clear that Meenambal cannot be the legal representative of Thayammal except as the person owning or possessing the house. A large part of the judgment of Beasley, J., is taken up with the consideration of the question whether by surrendering her widow's interest to her husband's reversioners Thayammal could defeat the charge made by the consent decree on this house. I am inclined to agree with Beasley, J., that Thayammal's surrender could not have that effect, though I do

not think it is necessary for the disposal of this case to express any final opinion on that.

But Mr. Ramanatha Shenai, who appears for Aburubammal, has taken a new point before us. He has drawn our attention to a decision of Phillips and Odgers, JJ., in *Vijiaraghavachariar* v. *Ramanujachariar*,[1] according to which, having made this alienation by way of a charge on the house, Thayammal had put it out of her power to make any surrender to the reversioners at all. In that decision the learned Judges follow the decision in *Sakharam Bala* v. *Thama*.[2] If that view is correct, then, as Mr. Ramanatha Shenai contends, the surrender made by Thayammal was invalid, and on the strength of that surrender the reversioners could not convey a good title to Meenambal. But that difficulty, I think, could be answered for Meenambal by calling in aid section 43 of the Transfer of Property Act. Mr. Ramanatha Shenai has contended that a transfer or attempted transfer of their expectancy by reversioners cannot be validated under the provisions of that section and has quoted *Ramasami Naik* v. *Ramasami Chetti*.[3] But that was an entirely different case. In that case certain defendants, who were in the line of succession to a Zemindari, purported to mortgage their expectancy, and the learned Judges held, no doubt rightly, that that was prohibited by section 6 (*a*) of the Transfer of Property Act. But here the reversioners did not purport to transfer any expectancy to Meenambal. They professed to be the owners of this house on the ground that the reversion had fallen in by the surrender and they professed to sell their present right in the house to Meenambal. If the true view is that the surrender was invalid, they had not a present right in the house. But, when Thayammal died, the reversion did fall in apart from the surrender, and Meenambal, if the conditions of section 43 of the Act are fulfilled, could call upon them to make good the transfer which they erroneously professed they were able to make at the time of their sale.

But that is really a by-path in this case. Anyhow it is admitted that Meenambal is in possession of the house, and the real question is whether the charge, which was created by the decree, is one which persists after Thayammal's death. If Thayammal had only a widow's estate—and on that assumption we must deal with the case—the charge would not persist beyond

1. (1928) 55 M.L.J. 859. 2. (1927) I.L.R. 51 B. 1019.
3. (1907) I.L.R. 30 M. 255: 17 M.L.J. 201.

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her death unless it was made for legal necessity. Beasley, J., in his judgment mentions that Meenambal did raise this objection, that the charge could not extend beyond Thayammal's death; but he says the question was not argued before him. But, if that contention was raised for Meenambal, no argument, so far as I can see, at that stage would be necessary. If Thayammal had nothing more than widow's estate in this house, all that Meenambal need do was to raise that contention and then wait for the decree-holder to attack the position by showing that the charge was created for necessity legally sufficient to give it effect on the husband's estate after Thayammal's death or at least to show that she took the charge in good faith that it was of that nature after making reasonable inquiries. The burden was obviously upon Aburubammal. Mr. Ramanatha Shenai admits that that is the well-known rule on the matter and that the burden would be upon his client if this was a suit. But he contends that the whole position is different because these are execution proceedings and that Meenambal cannot question the nature of the charge in execution proceedings. His argument is first that the Court in execution proceedings cannot question the validity of the decree. That is not a proposition which anybody has disputed before us or is likely to dispute. But he goes further and says that this is of the nature of a mortgage decree for sale, and he contends that no one can be heard to say in execution that this property is not to be sold in satisfaction of the charge. He quotes in support of that position *Kumaretta Servaigaran* v. *Sabapathy Chettiar*,[4] *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devastanams*[5] and *Sanwal Das* v. *Bismillah Begam*.[6] Now it is quite true that, if there is a mortgage decree for sale in a suit in which the validity and character of the mortgage have been established or admitted, no one can come in as a claimant under Rule 58 of Order 21 of the Code or as an objector under section 47 of the Code and say that the property mortgaged and ordered to be sold cannot be sold, because some one has a right to it. In such a case the mortgaged property must be sold in accordance with the decree, that is the mortgagor's and mortgagee's interests in the property, whatever they may be. But here to my mind we have something different from a mortgage decree for sale. This decree is the instrument which

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4. (1906) I.L.R. 30 M. 26: 16 M.L.J. 545.
5. (1909) I.L.R. 32 M. 429: 19 M.L.J. 401.
6. (1897) I.L.R. 19 A. 480.

created the charge, though no doubt the charge can be enforced in execution. An executing Court, though it cannot question the validity of a decree, is bound to construe the decree, if necessary. Here we have a charge on this house. What does that charge mean? Is it a charge on the house which is to subsist indefinitely until the debt is satisfied, or is it a charge on Thayammal's interest in the house as a widow subsisting only for her life-time? That is a question of the utmost importance, and, to my mind, a question which the executing Court in such a case as this must decide, if required to do so. We must remember that this was a consent decree made on the basis of a compromise. The charge is a charge created as part of Thayammal's contract though it is clothed in decretal language and so can be enforced in execution proceedings. But it is obvious that, although the Court was the agency through which this charge was created, Thayammal could give the Court no authority to create a charge of more extended validity than she herself could create. As the nature of the charge actually created is disputed, it must be determined before the decree can be executed.

That appears to me to be one answer to Mr. Ramanatha Shenai's contention that these matters cannot be agitated in execution. A second answer is that Aburubammal has brought Meenambal into the matter as Thayammal's legal representative. Meenambal denies that she is Thayammal's legal representative; then the question whether she is so or not has to be decided in execution proceedings. And how can it be decided without going into the question of the effect of the charge? Meenambal can only be legal representative in this case either if Thayammal had an absolute right to this property, which we must leave out of account, or if Thayammal created a charge on her husband's property validly so that it persisted beyond her death. In the latter case strictly Thayammal would have been acting, when she created the charge, as representing her husband's estate, and Meenambal, being in possession of the property on which the charge had been created, would be the legal representative of Thayammal in that capacity. The dispute whether Meenambal was the proper legal representative first came before the Master, and he refused to go into these questions whether the property was Thayammal's absolute property, whether Thayammal had only a widow's interest in it and whether she, having a widow's interest, had created a valid charge. On his refusal the matter was taken before the

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Judge and came before Kumaraswami Sastri, J. He found that the Master was wrong and remarked that this was not, as the Master thought, a question of going behind the decree, saying in the course of his judgment:

> "The question for decision is the character of a party, which in turn depends on the title to the property, the possession of which will make the person liable to be proceeded against in execution."

With that view I entirely agree.

There is a third difficulty in Mr. Ramanatha Shenai's way. As I have said, Kumaraswami Sastri, J., coming to that conclusion sent the matter back to the Master for the determination of these questions. The Master found that under the rules of the Court he could not deal with it and referred it to the Judge. It then came before Beasley, J. Now there was no appeal against Kumaraswami Sastri, J.'s order that these questions should be decided in execution. And, though there appears to have been an elaborate hearing before Beasley, J., there is nothing to show that any objection was taken for Aburubammal to the determination of these questions in the execution proceedings. In my opinion it is not open to Aburubammal now to say that this is a matter which cannot be dealt with in execution.

The position then appears to me to be this, that the decree-holder as alienee from Thayammal, who had only a widow's interest in the property, has not proved that this alienation, the charge made in the decree, was made for any necessity which could legally extend its validity beyond Thayammal's life, or that Aburubammal took this alienation in good faith after making the necessary inquiries. On the facts before us, on the contrary it appears probable that the debts for which this charge was created were not debts which could bind the husband's estate as they were contracted by Thayammal and her own brother. However, the burden is on the alienee, and the alienee has not discharged it.

There is only one other matter which I need mention. In one part of his judgment Beasley, J., has expressed the opinion that at any rate Aburubammal is entitled to recover the rents and profits of this house up to the date of Thayammal's death. In regard to that I must with respect differ from him. The charge, so long as it is valid, gives a right to recover the debt by sale of the house; but it could give no right to participate in the rents or profits.

In my opinion this appeal must be allowed and the execution petition dismissed with costs throughout.

Cornish, J.—I entirely agree.

I think that much of the argument addressed to us by the learned counsel for the respondent, the execution petitioner, was not really open to him in this appeal. When this matter came before Kumaraswami Sastri, J., the learned Judge clearly laid down that the objection raised by the appellant, who was the respondent in the execution proceedings, to the notice of execution, was not an attempt to go behind the decree against Thayammal, but was intended to show that the decree was not executable against her as Thayammal's legal representative. The appellant's objection was not an objection to the decree, which so far as she was concerned, was a perfectly valid decree against Thayammal's legal representative because she happened to be in possession of the property in which Thayammal, during her lifetime, had a Hindu widow's estate. I think the petitioner must have appreciated this position, because in her counter-affidavit she alleged that the property was the absolute property of Thayammal. These were the rival cases put forward by the two parties, and Kumaraswami Sastri, J., in his judgment expressed the opinion that this question must be determined in execution under section 47 of the Civil Procedure Code and that each party was entitled to prove the case which she set up in her affidavit. There was no appeal from this judgment, and when the case was referred by the Master into Court for determination by the Judge the argument appears to have proceeded on the lines indicated by Kumaraswami Sastri, J., in his judgment. Beasley, J., went very closely into the question whether the surrender of her estate, which Thayammal was alleged to have made in favour of the reversioners, from whom the appellant derived title to the property, was a valid surrender, and the learned Judge came to the conclusion that it was not. He did not, however, find that the property in respect of which the surrender is supposed to have been made was, as alleged by the petitioner, the absolute property of Thayammal. On the contrary, it is clear from the judgment that he was of opinion that it was property in which Thayammal had a Hindu widow's estate, for at the conclusion of his judgment he held that the

"defendant, having taken the property with full notice of the charge created upon it and not having proved that the debt was not for necessity, the onus of proving this being upon the defendant, cannot be heard to say that the decree is not to be executed against her."

In my view, the question whether Thayammal could or did terminate her widow's estate by a surrender is not very

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material. Her estate was terminated by her death a few months later, and it appears to me that, if the appellant is a legal representative within the definition of section 2 (11) of the Civil Procedure Code, it does not matter whether the title under which she purported to be in possession was a good title or a bad one. Now, the decree here is not a decree for sale of property under Order 34, Civil Procedure Code, so as to come within the rule referred to in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devastanams.*[5] It was perfectly open, therefore, to the appellant to object that the decree against Thayammal could not be executed against her unless it was shown that she was Thayammal's legal representative, either by being in possession of the property, which was Thayammal's property, or, at least, by being in possession of property over which Thayammal had created an encumbrance which continued to be binding on the property after Thayammal's death. I think that the appellant would have been entitled to succeed on the first point, because the petitioner failed to substantiate her allegation that the property in question was the absolute property of Thayammal. At the hearing, however, this point does not appear to have been argued.

It is necessary, therefore, to consider whether the appellant can be deemed to represent the estate of the deceased Thayammal by reason of being in possession of the property which Thayammal purported to charge, and which property Beasley, J., has found was taken by the appellant with full knowledge of the charge. But there the petitioner being the alienee of Thayammal, that is, the person in whose favour the charge was created by the consent decree, is met with the obligation of discharging the onus of proof which lies on the alienee of property from a Hindu widow. It has been held by a Full Bench in *Tirupatiraju* v. *Venkayya*[7] that the interposition of a consent decree does not make any difference to the onus of proof. The alienee must still show that the alienation upon which he relies is one that is binding on the estate. The onus, therefore, was clearly upon the petitioner to show that the charge bound the estate after Thayammal's death; but she has not attempted to discharge the onus. On this ground I am of opinion that the execution petition should have been dismissed.

N.S. *Appeal allowed.*

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5. (1909) I.L.R. 32 M. 429 at 440: 19 M.L.J. 401.
7. (1921) I.L.R. 45 M. 504: 42 M.L.J. 392 (F.B.).

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh.]

PRESENT:—LORD ATKIN, SIR LANCELOT SANDERSON AND SIR BINOD MITTER.

Raja Bahadur Raja Bishnath Saran Singh .. *Appellant**

v.

Rawat Sheo Bahadur Singh .. *Respondent.*

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Raja Bishnath Saran Singh *v.* Rawat Sheo Bahadur Singh.

*Oudh—Land Tenures in—Under-proprietary right—*Thekedar*—Right merely of a—Issue as to—Evidence.*

The suit was for a declaration that the defendant had no proprietary or under-proprietary right in a village situated within a *taluqa* of which the plaintiff was the taluqdar. In his right of taluqdar the plaintiff was the superior proprietor of the said village. The defendant was in possession of the village, and at the time of the suit he was paying to the plaintiff a yearly rent. His defence was that he held under-proprietary rights in the village which had been granted to his ancestor by the ancestor of the plaintiff four generations before. He denied that he was merely a *thekedar* of the village as alleged by the plaintiff.

The plaintiff and the defendant did not prove the particular cases on which they respectively relied in the pleadings. The plaintiff failed to establish that the defendant was a mere *thekedar,* and the defendant failed to prove the deed of gift on which he relied. The Chief Court held, however, on the other evidence in the case, reversing the Trial Judge, that in fact there was a grant by the ancestor of the plaintiff in favour of the defendant of an heritable and transferable estate in the suit village, by reason of which the defendant had under-proprietary rights.

On a detailed consideration of the evidence, their Lordships affirmed the Chief Court.

Appeal No. 57 of 1928 from a judgment and decree, dated the 13th December, 1926, of the Chief Court of Oudh, which reversed a judgment and decree, dated the 31st August, 1925, of the Subordinate Judge of Rai Bareli.

The suit, out of which this appeal arose, was brought by the present appellant, who was the taluqdar of Tiloi. The defendant (now respondent) was in occupation of the village of Sijni which formed part of the taluq and was held by him from the taluqdar at a rent which was raised in 1901 to the sum of Rs. 2,019. The defendant having set up a claim to hold the village permanently as proprietor or under-proprietor, the taluqdar instituted the present suit for a declaration negativing this claim. The Subordinate Judge made a decree for the plaintiff as prayed, but the Chief Court reversed his decision and dismissed the suit.

The plaintiff thereupon preferred the present appeal to His Majesty in Council.

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*P.C. Appeal No. 57 of 1928. 25th March, 1930.
Oudh Appeal No. 11 of 1927.

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Sir Lancelot Sanderson.

Dunne, K.C., Parikh and *B. B. Joshi* for appellant.

De Gruyther, K.C. and *Dube* for respondent.

25th March, 1930. Their Lordships' judgment was delivered by

SIR LANCELOT SANDERSON.—This is an appeal by Raja Bahadur Bishnath Saran Singh, who was the plaintiff in the suit, against a decree of the Chief Court of Oudh, dated the 13th December, 1926, which reversed a decree of the Subordinate Judge of Rai Bareli, dated the 31st August, 1925.

In the suit (No. 33 of 1925) the plaintiff prayed for a declaration that "the defendant has no proprietary or under-proprietary right in village Sijni, *pargana* Mohanganj." The above-mentioned village lies within the *Taluqa* of Tiloi, in the district of Rai Bareli, and the plaintiff is the owner of the *Taluqa.*

In his right of Taluqdar the plaintiff is the superior proprietor of the village.

The defendant, Rawat Sheo Bahadur Singh, is in actual possession of the village, and at the time of the suit he was paying to the plaintiff a yearly rent of Rs. 2,019.

The plaintiff served a notice of ejectment upon the defendant; the date of the notice is not clear: but it must have been shortly after the plaintiff came of age, which was in March, 1920. Thereupon the defendant brought a suit against the plaintiff under section 108 (8) of the Oudh Rent Act XXII of 1886, for contesting the notice of ejectment.

The notice of ejectment was based on the allegation that the defendant was merely a *thekedar* of the village and as such was liable to ejectment by means of a notice.

The defendant's suit was based mainly on the allegation that he held under-proprietary rights in the village, which had been granted to his ancestor by the ancestor of the plaintiff four generations ago.

The Assistant Collector, who heard the suit, decided on the 22nd March, 1923, that the matter was *res judicata* as far as the proceedings in the Revenue Court were concerned, and he held that the defendant could not be treated as an ordinary *thekedar* and liable to ejectment by notice "until the Civil Courts come to a contrary finding."

The notice of ejectment, therefore, was set aside.

The plaintiff thereupon instituted the present suit in the Court of the Subordinate Judge of Rai Bareli on the 28th March, 1923.

The plaint alleged:—

"2. That the defendant has been working as a *thekedar* on behalf of the estate for purpose of realising rent, etc., on payment of rent, and he has to pay Rs. 2,019 on account of rent at present."

And the prayer was for a declaration as already stated.

The main allegations in the written statement were as follows:—

"*Para.* 17.—This allegation of the plaintiff is quite wrong that the defendant has been working on behalf of the estate for the purposes of collecting rent, etc.; as a mere *thekedar* on payment of annual rent. The truth of the fact is that in *Shahi* times Bhawan Singh, ancestor of the defendant, had taken part in a battle along with Raja Shankar Singh, ancestor of the plaintiff, and he was killed in the same battle. After the death of Bhawan Singh, Ram Bakhsh Singh, the brother of the deceased, married the daughter of the deceased with Babu Thakur Pershad, son of Raja Shankar Bakhsh Singh. At that time Rawat Sarabjit Singh, son of Bhawan Singh, was a minor and for this reason Raja Shankar Bakhsh Singh, having regard to the relationship and services of Bhawan Singh, gifted the village in dispute under a deed of gift (which was burnt in a fire) to Rawat Sarabjit Singh generation after generation.

"*Para.* 18.—That the defendant and his ancestors exercised their proprietary rights, *i.e.*, gave land to *reyayas* for plantation of groves, allowed *muafis* and planted groves themselves which exist up to the present days, peopled *puras* and constructed dams.

"*Para.* 19.—That the defendant has been in possession of the proprietary powers for the last three generations under a deed of gift executed by Raja Shankar Bakhsh Singh and the plaintiff belongs to the fourth degree in the line of Raja Shankar Bakhsh Singh. The defendant has got proprietary rights in the village in dispute.

"*Para.* 20.—That the defendant and his ancestors have remained in proprietary possession for about 125 years from the date of gift on payment of fixed *jama* to the knowledge of the plaintiff and his ancestors and for this reason also the defendant has got under-proprietary rights in the village in dispute on account of adverse possession."

Amongst others the two following issues were stated:—

"1. Whether the plaintiff's ancestor if any made the defendant as his *thekedar* for purposes of collection of rent of village Sijni, in suit as alleged?

"2. Or whether the plaintiff's ancestor Shankar Singh gifted the village in suit to the defendant's ancestor about 125 years ago, conferring under-proprietary rights?"

The learned Subordinate Judge held that "Rawat Sarabjit Singh" (who was the ancestor of the defendant) "and his descendants can only be called lessees for the purposes of collecting rent and doing such other acts consistent with their status as mere lessees from the time prior to the old settlement."

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The learned Judge, therefore, decided issue 1 in favour of the plaintiff, and issue 2 against the defendant.

There were other issues, to which reference at present is not necessary.

In the result the learned Judge made a declaratory decree in the plaintiff's favour as follows:—"That the defendant is neither a proprietor nor an under-proprietor in the village Sijni."

The defendant appealed, and on appeal the learned Judges of the Chief Court held that the defendant had under-proprietary rights in the said village: consequently they allowed the appeal and dismissed the suit. From this decision the plaintiff has appealed to His Majesty in Council.

As already mentioned the plaintiff's case was that the defendant was a mere *thekedar* of the estate for the purpose of realising rent, and it appears that in the Court of the learned Subordinate Judge the plaintiff's pleader stated that he could not fix the precise period of the *theka* alleged in the plaint, but he submitted that the *theka* was given by one of the plaintiff's ancestors to the defendant's ancestor between the first regular settlement and the last settlement. The first regular settlement was in 1862, and the second regular settlement was in 1892.

The learned Subordinate Judge did not accept the plaintiff's case as to the date of the *theka*: he said:—

"It appears that there was some sort of *theka* or lease not of the date between the regular and recent settlement as alleged by the plaintiff, but of an older date, very probably of the time of Raja Shankar Singh prior to the regular settlement. It is impossible to know exactly what the terms of the *theka* were, and we do not know if it was oral or committed to writing."

The learned Judges of the Chief Court disagreed with the above-mentioned finding and held that the plaintiff's case, *viz.*, that the defendant was a mere *thekedar*, or collector of rents, had been disproved.

The learned counsel for the appellant drew their Lordships' attention with great care to the evidence, both documentary and verbal, given both on behalf of the plaintiff and on behalf of the defendant.

On consideration of the whole of the evidence their Lordships are of opinion that the decision of the Chief Court in the above-mentioned respect was correct and they are satisfied that it was not proved that the defendant was a mere *thekedar* with

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no higher rights than those usually held by one in such a position.

Their Lordships, however, are of opinion that the plaintiff did produce evidence which was sufficient to throw the onus upon the defendant of proving that he had the under-proprietary rights in the village which he claimed.

As already stated the defendant's case was based upon a deed of gift, which was alleged to have been made by Raja Shankar Bakhsh Singh, the ancestor of the plaintiff, to Rawat Sarabjit Singh, the ancestor of the defendant, about 125 years before the date of the written statement—and which was supposed to have been burnt.

With respect to the alleged deed of gift Wazir Hasan, J., was of opinion that the defendant's case that there was a written grant was not well established, and the learned Chief Judge came to the conclusion that a grant was made, and that it was probably contained in a deed but that was not proved.

Their Lordships are in agreement with the opinion of the learned Judges of the Chief Court that the evidence as to the existence of the alleged deed of grant and the alleged burning thereof was not of such a nature as would justify the Court in relying upon it, and they are of opinion that in the consideration of this appeal it must be taken that the alleged deed of grant and the terms thereof were not proved.

The position therefore, so far, is that the plaintiff and the defendant did not prove the particular cases on which they respectively relied in the pleadings. The plaintiff failed to establish that the defendant was a mere *thekedar,* and the defendant failed to prove the deed of gift on which he relied.

The learned Judges of the Chief Court, however, came to the conclusion that in fact there was a grant by Raja Shankar Singh in favour of Sarabjit Singh of an heritable and transferable estate in the said village, by reason of which the defendant had under-proprietary rights.

Their Lordships are of opinion that the consideration of this matter was open to the Chief Court on the pleadings and issues, as stated, and the question, therefore, arises whether on the evidence the decision of the Chief Court can be supported.

The learned Chief Judge stated that he was satisfied, on the evidence of Rani Harbans Kuar alone that the Raja Shankar Singh did grant the village Sijni to Sarabjit Singh at some time during the first quarter of the nineteenth century.

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Rani Harbans Kuar was the widow of Jagpal Singh, and the mother of Surpal Singh, both of whom were predecessors-in-title of the plaintiff.

The Rani's evidence was given in January, 1899, in proceedings in the Revenue Court, which were instituted in order to contest a notice of ejectment, which had been given in 1898 by the then Raja, Surpal Singh; the result of those proceedings was that the Deputy Collector cancelled the notice.

The statement then made by the Rani was put in evidence in this suit.

Among other things, she said that she had seen the deed of gift, and that it was read over to her by one Diwan Rani Din, and she went so far as to give some evidence as to its contents. In view of the fact that the learned Judges of the Chief Court were of opinion that the defendant's case as to the alleged grant in writing was not established, an opinion with which their Lordships agree, it must be obvious that it would not be right to base the decision of this case solely upon the evidence of the Rani, who had pledged herself to such a material part of the defendant's case, which has been found to be not established.

This, however, does not conclude the case, because the Rani's evidence was by no means the only evidence on the record and in their Lordships' opinion certain facts were proved, which went to corroborate that part of the Rani's evidence on which the Chief Court relied.

The evidence goes to show that the defendant's ancestors were in possession of the village for very many years, and that for at least three generations of the Rawats, the plaintiff's ancestors had accepted rent from the Rawats without any interference with the Rawats' possession of the village, and as far as their Lordships are aware, the rent was at the same rate until, by an agreement of compromise made in August, 1901 (to which reference will be made presently), the rent was raised from Rs. 1,451 to Rs. 2,019.

The long-continued possession and the payment of rent at the same rate during such possession are not by themselves sufficient to decide the case: for such facts, taken by themselves, are consistent not only with the defendant's case, but also with plaintiff's case.

There were, however, in their Lordships' opinion, other matters proved in the evidence, which are consistent with the

defendant's case, and which are not consistent with the plaintiff's case, as for instance: the facts referred to in the report of the Settlement Officer, Mr. D. C. Baillie, made in 1892, *viz.*: that the terms of the lease are very favourable, and rights superior to those of an ordinary lessee are claimed, but have never been decreed . . . Sarabjit, the original lessee, made a band across the Naiya, which gives a lot of water. Of the wells, three belong to the Rawats, all made by Sarabjit Singh. . . . The Rawats have had full powers of owners, and have given permission to plant baghs, etc., but it is said they refer to Tiloi for permission. The management and *sir* is in Tiloi's name, but the Rawats have actually had all the benefit."

It is true that the Rawats did not claim to be recorded as under-proprietors at either of the above-mentioned settlements, as Mr. Baillie pointed out in his letter to the Commissioner of Lucknow, dated the 12th August, 1893. This is a fact which, at first sight would seem to be inconsistent with the defendant's case; but it appears that the Rawats were not entered on the record at all, either as under-proprietors, or as *thekedars*, or tenants.

There is no doubt that the defendant and his predecessors were in possession at the time of the two settlements, and they should have been entered on the record in one or other of the above-mentioned capacities.

There must have been some good reason why no record of any kind of the Rawats' possession was made.

It is significant that Mr. Baillie, in 1893, acting as manager of the Court of Wards, which then had charge of the estate of the plaintiff's predecessor, though he considered it would be difficult for the Rawats to prove any permanent right, recommended that it was not necessary for the Court of Wards to take any action to recover possession which had been held by the tenants' family for 80 years.

The Board agreed that existing arrangements should not be disturbed, and that the Deputy Commissioner should settle terms as to the new *jama* amicably with the incumbent.

The rent, as already mentioned, was raised from Rs. 1,451 to Rs. 2,019; this was brought about in August, 1901, by a compromise of a suit instituted by the manager of the Tiloi estate against the defendant, for a declaration that the defendant had no proprietary right in the village Sijni. The agreement that the rent should be increased was in consequence of

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the amount of the Government revenue having been raised in the last settlement. By the terms of the compromise, the question of the title between the parties was left open and undecided, and it was provided that the compromise should in no way affect the title of the parties.

The result, therefore, is that the raising of the rent payable by the defendant does not affect the question now under consideration.

In their Lordships' opinion, there is no doubt that there was a grant of some kind to Sarabjit Singh when he was a boy of about 5 years old, and it is not suggested that a grant of the kind now relied upon by the defendant could not have been made orally at the time alleged. The facts that the first grantee was a child at the time when the grant was made, that the interest of the grantee was treated as being hereditary, that the predecessors of the defendant expended money in making improvements on the land, that they exercised full powers of owners in material respects, are some of the matters which their Lordships think go to corroborate that part of the evidence of the Rani Harbans Kuar which was accepted by the learned Judges of the Chief Court.

It is not necessary to deal with the evidence in greater detail because their Lordships are satisfied that there was evidence to justify the conclusion at which the Chief Court arrived, and they are not prepared to disagree with the decision of the said Court.

It is necessary to refer to the fact that by a proclamation in March, 1858, of the Viceroy and Governor-General of India, the proprietary rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government. The confiscation would include not only the proprietary but also the under-proprietary rights.

The Government, however, by a *sanad,* dated the 25th October, 1859, granted to Raja Jagpal Singh, one of the plaintiff's ancestors, the full proprietary right, title and possession of the estate of Tiloi.

It was a condition of the grant that all holding under the Raja should be secured by him in the possession of all the subordinate rights which they formerly enjoyed.

Their Lordships feel no doubt that this condition was observed, and that the defendant's ancestors were allowed to

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and continued to enjoy the same proprietary rights under the Raja after the above-mentioned grant by the Government as they did before the confiscation.

In view of the fact that their Lordships agree with the decision of the Chief Court that the defendant has under-proprietary rights in the village subject to the payment of rent to the plaintiff, it is not necessary for them to consider the further question of limitation, on which reliance was placed by the learned counsel for the defendant.

Their Lordships, therefore, are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Watkins & Hunter.*

Solicitor for respondent: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD TOMLIN, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Ganeshi Lal and another .. *Appellants**

v.

Thakur Charan Singh and others .. *Respondents.*

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Transfer of Property Act (IV of 1882), S. 82—Provisions of—Modification of, by introduction of extrinsic principle—Permissibility—Mortgaged properties—Purchaser of one of, subject to mortgage—Liability to contribution of, to purchaser of another property paying off mortgage—Contract between latter and mortgagor to pay off that mortgage—Effect.

On 8th November, 1906, the owner of properties *K* and *M* mortgaged them both to Mangal. On 19th May, 1914, property *K* was sold to *S*, the ancestor of the respondents, a portion of the purchase price being left with *S* to enable him to discharge the mortgage of 8th November, 1906 and other debts of the vendor, including certain debts for which creditors had already obtained decrees and had attached the properties. In July, 1914, property *M* was sold to the appellants in execution of a decree obtained by Kishin, a creditor of the mortgagor before 19th May, 1914. The sale was subject to Mangal's mortgage. Then on 14th November, 1914, property *K* was sold under a decree obtained by another creditor of the mortgagor before 19th May, 1914. That sale was also subject to Mangal's mortgage. The purchaser later on, on 16th April, 1915, conveyed property *K* to *S*.

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*P.C. Appeal No. 28 of 1929. 13th March, 1930.
Allahabad Appeal No. 19 of 1927.

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S having failed to pay off Mangal's mortgage and the other debts of the mortgagor out of the money left with him for that purpose, Mangal took in 1918 proceedings to enforce his mortgage by the sale of both properties, and, in execution of the decree obtained by him, both properties were sold in August, 1921. Before the confirmation of the sale, however, S intervened and deposited the amount required to satisfy the mortgagee's claim and thus obtained a setting aside of that execution sale. The amount so deposited by S was a much greater sum than would have been required if the mortgage had been paid off in 1914.

S then died, and his representatives the respondents sued to compel from the appellants as owners of property M contribution towards the amount which S had applied in paying off Mangal's mortgage.

Held, that the provisions of S. 82 of the Transfer of Property Act applied to the case and that the appellants were bound to make contribution.

The appellants were not parties to the contract between S and the mortgagor for the application of the money, and the benefit of the contract had not in any way passed to them. They bought subject to the mortgage and paid a price for the property on that footing and they cannot be allowed to have the benefit of it free from the mortgage and that without making any payment towards the attainment of that satisfactory result.

S. 82 prescribes the conditions in which contribution is payable and it is not proper to introduce into the matter any extrinsic principle to modify the statutory provisions.

Appeal No. 28 of 1929 from a judgment, dated the 5th February, 1926 and from the final decree, dated the 11th February, 1927, of the High Court, Allahabad, which reversed a judgment and decree, dated the 1st May, 1922, of the Subordinate Judge of Aligarh.

The facts of the case are stated sufficient fully in the judgment of the Judicial Committee.

One Bijai Indar Singh owned two properties (1) a share in Mauza Kheria Gurdeo, and (2) a share in Mauza Mirpur, and he mortgaged both of them to one Mangal Sen on the 8th November, 1906, and in execution of the mortgagee's decree for sale both properties were sold on the 20th August, 1921, and the plaintiffs-respondents satisfied the decree by paying Rs. 31,939 on the 19th September, 1921, and the sale was set aside.

The plaintiffs-respondents, who are the present owners of the first village, Kheria Gurdeo, filed the suit (out of which this appeal arose) on the 20th December, 1921, against the appellant, Ganeshi Lal, who owns the second village, Mirpur, for rateable contribution of the mortgage debt paid in satisfaction of the mortgage, dated the 8th November, 1906.

The defendant denied the plaintiff's claim to contribution, and the Trial Judge dismissed the plaintiff's claim, but, on appeal, it was allowed by the High Court and a decree passed in the plaintiff's favour.

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The learned Judges of the High Court, in allowing the plaintiff's claim, observed as follows:—

"The law which declares the liability of several properties mortgaged to secure one debt is contained in the first clause of section 82 of the Transfer of Property Act. It is there laid down that in the absence of a contract to the contrary, the several properties mortgaged are liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage.

"It follows, therefore, that unless there was a contract to the contrary, the two items of the property with which we are concerned were liable to contribute rateably to the mortgage-debt in favour of Mangal Sen.

"It has been judicially held that the expression 'a contract to the contrary' in section 82 means a contract between the mortgagor and mortgagee (*see* the decision in *Ramabhadrachar* v. *Srinivasa Aiyangar*[1]) and if that is a correct statement of the law it follows that in the present case section 82 is left to its full operation for it is not pretended that there ever was any contract between Bijai Indar, the mortgagor and Mangal Sen, his mortgagee, that the two properties were to be liable in any other manner than that contemplated by the section; and neither Sher Singh nor Ganeshi Lal as purchasers subsequent to the mortgage could, as against Mangal Sen, set up a case that the properties were not rateably liable to contribute to his debt. *Prima facie,* therefore, Ganeshi Lal is not entitled in this suit to maintain that the property purchased by Sher Singh was liable, to the full extent of its value, to be taken in satisfaction of Mangal Sen's decree.

"But the plea put forward by Ganeshi Lal was that by virtue of the terms of his purchase from Bijai Indar, Sher Singh was liable to satisfy the entire mortgage debt of Mangal Sen out of that portion of the purchase-money which was left with him for that purpose and that if he had done what he was legally obliged to do the result would have been that Mauza Mirpur would have stood free of the mortgage and could not afterwards have been sold in execution of Mangal Sen's decree. And so it has been argued before us that the plaintiffs have no right to enforce contribution. It is said that Sher Singh when he satisfied the mortgage decree was paying not his own money but the money of Bijai Indar which had been left with him to discharge the mortgage.

"The defendant by raising these pleas is clearly claiming for himself the benefit of a contract to which he was no party. The obligation to pay off the mortgage arose out of the agreement for sale entered into between Bijai Indar and Sher Singh. That was a personal obligation which Bijai Indar as vendor might enforce against his purchaser but it cannot be pleaded or enforced by Ganeshi Lal, who was a stranger to the contract. Ganeshi Lal bought the share in Mirpur subject to the mortgage in favour of Mangal Sen and he cannot escape liability by pleading the terms of the sale-deed executed in favour of Sher Singh."

The defendants appealed to His Majesty in Council against the said decree of the High Court.

Dube for appellants.

Subba Rao for respondents was not called upon.

1. (1900) I.L.R. 24 M. 85.

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13th March, 1930. Their Lordships' judgment was delivered by

LORD TOMLIN.—This is an appeal from a judgment of the High Court of Judicature of Allahabad which reversed a judgment and decree of the Subordinate Judge of Aligarh.

In the suit the respondents, before their Lordships' Board, being the representatives of the purchaser of one property (which may be called *K*) sued for contribution from the appellants, the purchasers of a second property (which may be called *M*), on the ground that the purchaser of *K* had paid off a mortgage which covered both properties.

Now the section of the Transfer of Property Act which deals with the right of contribution is section 82, and it is in these terms:—

"Where several properties, whether of one or of several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage."

That is the statutory provision by which contribution as between owners of equities of redemption subject to a common mortgage is regulated.

The facts of this case are as follows. On the 8th November, 1906, the original owner of both properties created a mortgage for 8,000 rupees in favour of one Mangal. On the 19th May, 1914, he purported to sell property *K* to Sher Singh, the ancestor of the respondents for 33,000 rupees, and a sum of 32,000 rupees out of the purchase price was left with Sher Singh to enable him to discharge the mortgage of the 8th November, 1906, and other debts of the vendor, including certain debts for which creditors had already obtained decrees and had attached the properties. In July, 1914, the other property *M* was sold to the first appellant on behalf of himself and the second appellant in execution of a decree obtained by Kishin Singh, a creditor of the mortgagor before the 19th May, 1914. It was sold for 2,900 rupees subject to Mangal's mortgage. That sale constituted the title of the appellants to property *M*. Then on the 14th November, 1914,* property *K* was sold under a decree obtained by another creditor of the mortgagor before the 19th May, 1914. This sale was also subject to Mangal's

*The auction sale in question was on the 21st May, 1914, for Rs. 1,450 (not Rs. 1,950, as stated in their Lordships' judgment) and on the 14th November, 1914, the sale was confirmed and a certificate granted to the purchaser.—K.J.R.

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mortgage and was for 1,950 rupees. The purchaser later on, on the 16th April, 1915, conveyed property *K* to Sher Singh for the sum of Rs. 2,500. These sales, of course, overrode the sale of both properties to Sher Singh purported to have been made on the 19th May, 1914. Sher Singh having failed to pay off Mangal's mortgage and the other debts of the mortgagor out of the money left with him for that purpose, Mangal's mortgage continued in force against both properties. In 1918 Mangal took proceedings to enforce his mortgage by the sale of both properties, and he obtained judgment and a decree for sale. On the 20th August, 1921, both properties were put up for sale and were sold, but before the sale was confirmed, namely, on the 19th September, 1921, Sher Singh, the purchaser under the contract of the 19th May, 1914, and the assign of the purchaser of property *K* under the sale of the 14th November, 1914 (the sale was on the 21st May, 1914 and confirmed on the 14th November, 1914), intervened and deposited the amount required to satisfy the mortgagee's claim and thus obtained a setting aside of the sale of the 20th August, 1921. The position, therefore, was this, that subject to Mangal's mortgage, Sher Singh held property *K* under the title made by the execution sale of the 14th November, 1914, and that subject to the same mortgage, the appellants held property *M* under the title made by the execution sale of July, 1914. Sher Singh had not carried out his obligation to the mortgagor under the sale-deed of the 19th May, 1914, in respect of the money left with him, but in 1921 he provided all the money then necessary to pay off Mangal's mortgage, which necessarily was a greater sum than would have been required if the mortgage had been paid off in 1914. Sher Singh died, and his representatives, the present respondents, launched the suit to compel from the appellants as owners of property *M* contribution towards the amount which Sher Singh had applied in paying off Mangal's mortgage. The appellants' answer was this:

> "Your ancestor had the money, or at any rate a substantial portion of it, 17,000 rupees, from the original mortgagor, and he ought to have applied that money in paying off the mortgage in 1914, and so far as it became necessary in 1921 to pay more than the 17,000 rupees that was due to your ancestor's negligence, and, therefore, we are not liable to contribute, because he had a contract with the mortgagor to apply the money."

The Subordinate Judge took the view, founding himself apparently on the case of *Muhammad Abbas* v. *Muhammad Hamid*[2] that there was an equitable principle which precluded

2. (1912) 9 A.L.J. 499.

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the respondents from insisting on the right of contribution conferred by section 82. The High Court, on the other hand, took a different view, and held that the appellants were not parties to the contract between Sher Singh and the mortgagor for the application of the money, and that the benefit of the contract had not in any way passed to them, and that in these circumstances the provisions of section 82 applied and that the appellants were bound to make contribution.

Their Lordships are of opinion that the conclusion at which the High Court arrived is correct. It would indeed be somewhat surprising if the result were otherwise. The appellants bought subject to the mortgage and paid a price for the property on that footing, and their contention really amounts to this, that having paid for the property on the basis of its being subject to the mortgage they ought now to be allowed to have the benefit of it free from the mortgage and that without making any payment towards the attainment of that satisfactory result.

It seems to their Lordships that section 82 is the section that governs the case and that as the Act prescribes the conditions in which contribution is payable it is not proper to introduce into the matter any extrinsic principle to modify the statutory provisions. The decision in the case to which the Subordinate Judge referred may be justified on the footing that in that case there passed to the party from whom the contribution was sought the benefit of the contract by which the money was to be applied, so that he could say "I have a contract which frees me from the liability to contribution which the section would otherwise impose on me." No such plea is available to the appellants in this case. They were not parties to the contract of the 19th May, 1914, nor has the benefit of that contract passed to them in law or in equity.

Their Lordships are of opinion this appeal fails, and they will humbly advise His Majesty accordingly.

The appellants will pay the costs of the respondents in the appeal.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K. J. R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE CURGENVEN AND MR. JUSTICE PAKENHAM WALSH.

Sri Mirza Raja Sri Pushavati Alakh Narayana Gajapathiraj Maharaj Manya Sultan Bahadur Garu, Rajah of Vizianagram .. *Appellant** (*2nd Appellant*)

v.

Vuggina Appalaswami and others .. *Respondents* (*Respondents*).

F.B. — Rajah of Vizianagram *v.* Appalaswami.

Service grants—Resumption—Grant burdened with service and grant in lieu of wages—Distinction—Grant prior to the Permanent Settlement—Onus—No presumption about the class of grant.

There is a distinction between a grant burdened with service and one made in lieu of wages. In the former case, the grant cannot be resumed without at least showing that the services were required to be done and were refused.

Where a Zamindar wants to resume lands granted before the Permanent Settlement and held by the grantees from father to son, the *onus* is always on the plaintiff.

Forbes v. *Meer Mahomed Tuquee,* (1870) 13 M.I.A. 438, followed.

Where the question is as to the class to which a specified grant involving service belongs, there is no presumption one way or the other.

Thiruvenkatacharlu v. *Shaik Altoo Sahib,* (1925) 50 M.L.J. 251, referred to.

The words "at the will and pleasure of your Highness" and "so long as your Highness may be pleased," occurring in a deed of grant, the operative part of which is clear and unambiguous, are only expressions of subservience and cannot be regarded as converting the position of the grantee as a mere tenant-at-will.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Venkatasubba Rao, dated 6th November, 1924, in Appeal No. 257 of 1919, preferred against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in Original Suit No. 32 of 1913.

S. Srinivasa Aiyangar and *S. Venkatesa Aiyangar* for appellant.

G. Lakshmanna, K. Venkataramaraju and *P. Vedachalam* for respondents.

The judgment of the Court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the trustee to the Vizianagram Estate under a trust deed,

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*L.P.A. No. 117 of 1925. 5th November, 1929.

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dated the 28th October, 1912, to eject the defendants from the properties mentioned in the plaint and to direct payment of past mesne profits amounting to Rs. 1,500 and future mesne profits at Rs. 750 a month till delivery of possession.

The case of the plaintiff as set out in the plaint was that the village referred to in the plaint formed part of the *mal* assets of the Vizianagram Zamindari which is subject to a permanent peishcush, that some time after the Permanent Settlement the revenues of the suit village were from time to time granted by the former Zamindars of Vizianagram to the ancestors of defendants 1 to 6 as remuneration in lieu of cash allowance for rendering private and personal services to the Zamindar and subject to the payment of kattubadi of Rs. 37-8-0 and without any rights of alienation, that the grant was resumable at the will and pleasure of the grantor or his heirs, that the services for the remuneration whereof the grant was made consisted in the grantee or grantees maintaining a certain number of peons for the purpose of the grantees and their peons escorting the Zamindar in his trips and shooting and hunting expeditions, attending the annual Dasara Durbars at Vizianagram and rendering such other services as may be ordered from time to time which services were all of a purely personal and private nature, that the village was on several occasions resumed and kept under the management of the Zamindar and regranted at the request of the service-holders subject to the same conditions of service as before, that in 1872 the village was last resumed by the late Zamindar and regranted to defendants 1 and 2 and the father of defendants 3 to 6 on the same conditions of service and resumability, etc., as before and they executed a registered agreement, dated the 26th of December, 1873, that defendants 1 to 6 were rendering their services properly whenever called upon to do so till about 3 years before the date of the plaint and since then have neglected to render the service, that the defendants have colluded together and brought about some fraudulent mortgages, sales and other documents *mala fide* and without consideration, that some or all of the defendants 7 to 108 are in possession of the suit village, that the alienations are not valid and binding upon the plaintiff, that the plaintiff has no desire or necessity to continue the services of the defendants or permit them to enjoy the revenues of the village, that notice was given to the defendants on the 28th of December, 1910, terminating their services and calling upon them to vacate and surrender the suit properties, that the defendants have all combined together and failed to do so, and that the defendants

have denied the title of the plaintiff setting up an adverse claim in themselves and have forfeited their tenure by reason of the denial and the alienations.

Defendants 7 to 69 were impleaded as they belonged to the family of defendants 1 to 6 and were unlawfully in possession of the suit properties and the other defendants were added as they were collusively in possession under defendants 1 to 6.

The contesting defendants filed written statements. They pleaded that the suit village and not merely its revenues was granted about 200 years prior to the Permanent Settlement to the ancestors of the present holders by the then local Chief of Sringavarapukotta, that it is not true that the grant was made as remuneration in lieu of cash allowance for rendering services private and personal to the Zamindar, that if the suit village was to be regarded as granted on a tenure connected with service, the grant was an absolute grant conferring an hereditary estate on the grantees for past services rendered and burdened with future services, that the grant is not, therefore, resumable at the will and pleasure of the grantor or of his heirs, that the services connected with the tenure of the suit village were not of the nature set out in the plaint, that the services rendered before the grant were of a public nature being help given in keeping the country in a tranquil condition in those days of trouble and disturbance, that the future services expected of the grantee were similar in character if required and if not they were merely nominal services such as attending Dasara, that the village was not on several occasions, as alleged in the plaint, resumed and kept under the management of the Zamindar and regranted at the request of the holders, that the holders have been enjoying the village hereditarily with full power of alienation, that the instrument, dated the 26th December, 1873, referred to in the plaint was executed on account of undue influence and without any consideration for it under a misconception of the rights of the executants and under an erroneous view of the law, that the holders of the village had been rendering certain merely nominal services and that the defendants are still willing to render the usual nominal services. The defendants deny any collusion. They state that the plaintiff has no right to call on them to vacate the properties. They state that they never denied the title of the Zamindar or set up any adverse rights. They state that even assuming that the plaintiff has a right to resume, they are the cultivating ryots of the village and are the owners of the kudivaram and that the

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plaintiff has at best a right to resume the melwaram only and has no right to eject them. They state that the mesne profits claimed are excessive, that the suit is barred by limitation in the case of the alienees and that the plaintiff is entitled to no relief.

The alienees filed written statements denying that the plaintiff has any right against them.

The Subordinate Judge dismissed the plaintiff's suit. He held that the evidence adduced by the plaintiff was too meagre to sustain any finding in his favour, that there was no record to show that the assets of the village were included in the *mal* assets on which peishcush was settled, that there was no record to show that the Vizianagram Zamindar granted the revenue only on land and only after the Permanent Settlement with the Government, that there was no evidence to show the resumptions of the land or revenue and control of the village by the Zamindar before the regrants were made and that the evidence did not support the case of the plaintiff that the grant was only a grant made in lieu of remuneration for services. He says that there is no evidence that the Dasara Durbar was ever held for the past 20 years or that the defendants refused to attend either as huntsmen or as Dasara attendants with their muskets and that the notice terminated the defendants' services without giving them an opportunity to do the services required. He then discusses the evidence oral and documentary and dismisses the plaintiff's suit.

An appeal was filed and it came on before Venkatasubba Rao and Srinivasa Aiyangar, JJ. The learned Judges differed in their opinion. Venkatasubba Rao, J., agreed with the Subordinate Judge and held that the plaintiff was not entitled to eject the defendants. Srinivasa Aiyangar, J., took the opposite view. The result was that the judgment of the Subordinate Judge was confirmed under section 98 of the Civil Procedure Code and the appeal was dismissed with costs.

Owing to the difference of opinion this Letters Patent Appeal has been filed.

Although in the plaint it was alleged that the grant was made after the Permanent Settlement by the Zamindar of Vizianagram, the claim made in the plaint to eject the defendants and that the village should be put in possession of the plaintiff was abandoned. It is also conceded that the averment in the plaint that the grant was made subsequent to the

Permanent Settlement is not true. It was admitted that the grantor was not a member of the present dynasty but was a previous Zamindar who held Vizianagram before the ancestors of the present Zamindar's family acquired it. In fact, we find from Exhibit VII, which is dated the 26th September, 1852, that the grant was made about 100 years prior to it and that it was made by Srimuki Kasipathi Raju. Both the learned Judges agreed that although there is no evidence that the properties claimed were included in the Permanent Settlement as alleged by the plaintiff and although the plaintiff has not produced all the papers regarding the Permanent Settlement it can be inferred from the subsequent conduct of the Zamindar as well as the grantees that the village was included and that the Government did not at any time put forward any claim to the village. The important question on which the learned Judges differed was whether the grant was a grant of land burdened with service or whether the land was granted merely in lieu of wages and so resumable at pleasure.

The original grant has not been produced by the plaintiff nor has he filed the papers in connection with the Permanent Settlement which would throw much light on the matter as to services. As a matter of fact the plaintiff started with the case that the grant was after the Permanent Settlement. The case was obviously not correct and was contradicted by the evidence on record. As that case was given up at the trial in the High Court, it is not necessary to proceed with the matter further than to state that it is impossible to see how the claim for ejectment made in the plaint can be supported in the absence of any proof as to the terms of the grant or the nature of the service at the time the original grant was made.

No satisfactory explanation has been given why these important records have not been produced or how it came about that the definite allegations in paragraph 3 (*a*) of the plaint were made.

The leading case on the subject of resumption is *Forbes* v. *Meer Mahomed Tuquee.*[1] Their Lordships of the Privy Council after observing that it was a very material issue whether in point of fact the lands claimed were on the occasion of the settlement treated as *mal* assets of the Zamindari in which case only their Lordships were of opinion that the question of any resumption would arise proceeded to deal with

1. (1870) 13 M.I.A. 438.

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the question as regards the right of resumption assuming that they were included in the *mal* assets. After dealing with the various decided cases their Lordships observed:

"The conclusion which they would draw from the decided cases, as well as from the reason of the thing, is, that in every case that right to resume must depend in a great measure upon the nature of the particular tenure, or the terms of the particular grant. They agree with the observation of Mr. Justice Jackson, *Baboo Koolodeep Narain Singh* v. *Mahadeo Singh and others*,[2] that there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands" —at p. 464.

After dealing with the facts, their Lordships conclude as follows:—

"It emphatically lay upon the appellant, who is seeking to dispossess, or to rack-rent, the respondents, who by themselves, or their ancestors, have brought those lands into cultivation, and enjoyed them for so long a period; who must have been permitted by former Zamindars to continue undisturbed in such enjoyment long after the incursion of wild elephants had become mere matter of tradition, to make out a clear title to resumption''—at p. 466.

The documents in question and the facts in the case have been dealt with in great detail both by the Trial Judge and by Venkatasubba Rao and Srinivasa Aiyangar, JJ., in appeal and we think it unnecessary to repeat what was already been said.

The following facts emerge as to which there can in our opinion be no possible dispute.

The grantees were hillmen and the lands are lands situate in hills. The grant was made about 1752 or earlier long before the present Zamindar acquired the villages. According to Exhibit VII the grant was made in 1752 and there could be no doubt on the evidence that the defendants and their predecessors-in-title have been in possession of the lands for over 250 years, and that they have brought the land under cultivation, the lands have been descending from father to son and they have been alienating the lands without question. The documents relating to alienation filed in this case take us back to 1844. On these facts we think the *onus* is very heavy on the plaintiff to show that the grant was merely a grant in lieu of wages resumable at will and not a grant burdened with service in which case it could not be resumed without at least showing that the services were required to be done and were refused. As we have already said, the grant has not been produced nor have the accounts and proceedings in connection with the Permanent Settlement which might have thrown much light on the

2. (1866) 6 W.R. 199 at 209.

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terms under which the lands were granted been produced. It is not suggested that they were not available and it seems to us that the plaintiff has utterly failed on the main allegation made in the plaint that the grant was made after the Permanent Settlement or was merely a grant in lieu of wages for personal services.

As regards the services in respect of which the grant was originally made, the Subordinate Judge in dealing with the third issue which related to the persons who made the grant to the defendants observed that it was clear that the Mukhi family made the grant to the Dorais about 200 years ago on the only condition inferrable of rendering military aid and to quell disturbances within or quarrel with a neighbour. He disbelieves the plaintiff's case as to the services. We agree with the Subordinate Judge in thinking that the plaintiff has not proved that the grant was made for the performance of the private and personal services referred to by the plaintiff in the plaint. We are of opinion that the plaintiff has failed to prove that the grant was a grant made to the ancestors of the defendants merely in lieu of remuneration for personal services.

A great deal of argument was addressed to us on the presumptions which ought to be raised in cases of grants made for services. We are of opinion that where a Zamindar wants to resume lands granted before the Permanent Settlement and held by the grantees from father to son the *onus* is always on the plaintiff. We think the observations of their Lordships of the Privy Council in *Forbes* v. *Meer Mahomed Tuquee*,[1] which we have already referred to, are clearly to that effect.

In *Lakhamgavda* v. *Keshav Annaji*[3] Sir Lawrence Jenkins, C.J., states that the combination of an interest in land and an obligation as to service may fall under three heads, *viz.*: (1) there may be a grant of land burdened with service, (2) there may be a grant in consideration of past and future service, and (3) there may be the grant of an office the services attached to which are remunerated by an interest in land; that in either of the first two classes of grants it may be made a condition that the interest in the land should cease when the services are no longer required, but in the absence of a provision to that effect lands held under those grants are not resumable at will. The learned Chief Justice held that in cases where there has

1. (1870) 13 M.I.A. 438. 3. (1901) I.L.R. 28 B. 305.

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been long and undisturbed possession enjoyed by the defendant and his predecessors, it will require strong evidence on plaintiff's part to make out his case for eviction.

We agree with the observations of Venkatasubba Rao, J., in *Thiruvenkatacharlu* v. *Shaik Altoo Sahib*,[4] that where the question is as to the class to which a specified grant involving service belongs there is no presumption one way or the other.

A great deal of reliance has been placed by the Advocate for the appellant on Exhibit A, which was executed by the defendants 1 and 2 and by the father of defendants 3 to 6 in favour of the then Zamindar on the 26th of December, 1873. It appears from Exhibit M (1), dated the 4th of July, 1872, that the inhabitants of certain villages belonging to the Zamindar petitioned the Raja stating that the persons referred to therein had mortgaged three-fourths portions of their holdings to certain persons and because of their not being able to earn their living upon the remaining portion were committing acts of trespass and mischief referred to therein and they prayed that the Zamindar would put a stop to this by attaching the villages and warning the holders of the land not to commit any mischief. Upon this, the Amin sent a report, Exhibit M (2), on the 6th of July, 1872, stating that those people were holding lands at favourable assessment, that they had mortgaged their holdings and were carrying away the crops of other people, that a complaint was made to him, that there was a balance of Rs. 22-13-6 payable by them to the Estate, and that they had not appeared even when summoned many times and he prayed for permission to attach the village. Upon this, the order Exhibit K was passed on the 11th of October, 1872, by the Raja of Vizianagram asking the Amin to collect the sum of Rs. 22-13-6 at once. There is nothing in the order authorising any attachment as prayed although Exhibit K is a reply to Exhibit M (2), dated the 6th of July, 1872.

On the 12th of October, 1872, the Mirasdar of Relli wrote Exhibit Q to the Amin of Pedagadi Tana stating that one Pandraju, the holder of a sixth share in a village, died leaving no male issue except a foster-son, that the deceased was keeping a woman of low caste and a male child was born to her and that both of them were quarrelling as regards the share. The petitioner prayed that the share may be attached till the succession was settled.

4. (1925) 50 M.L.J. 251.

Exhibit Q (1), dated the 21st of October, 1872, is a communication from the Amin to the Raja requesting orders on the petition Exhibit Q.

On the 8th of November, 1872, the order Ex. L was passed stating that the one-sixth share of the deceased and the remaining five-sixths share in respect of which cist was not paid should be attached and leased out and that the rents should be collected. We may point out that the land was never actually taken out of their possession of the grantee and let out to others. Attachment was evidently merely preventing the grantees from cultivating for a short time.

On the 20th of January, 1873, the first and second defendants and others sent the petition Exhibit M to the Superintendent of Vizianagram Estate stating that the lands which had long been in their enjoyment had been attached without any reason, that they were suffering for their maintenance, because the crops had been poor and because there was famine the previous year and that if they had committed any fault, the same may be enquired into.

Upon this the Raja sent Exhibit M (3), dated December, 1873 (the portion bearing the date is torn) stating that these people executed a Kararnama on a Rs. 16 stamp paper stating among other things that they would render Sircar service properly with 32 men and that if it was brought to the notice of the Huzur that they behaved improperly they could be dispossessed and the village entered in the Sircar accounts. Then it says:

> "We have been pleased to favour and grant Appandorapalem, hamlet of Relli, which bears, out of Gudikattu Doulu of Rs. 203-8-0 deducting Rs. 37-8-0 Sircar cist, remaining cist of Rs. 166 for service Muzaravasatu to Uggina China Ramandora and others."

The document referred to in Exhibit M (3) is Exhibit A. It purports to be a deed of agreement executed by the 1st and 2nd defendants and others and recites that the village which was assigned to them for services rendered was resumed in consequence of their failure regularly to perform the services, and that on their representation that they had no other means of livelihood and that in case the Raja revoked the resumption of the grant they would henceforward be properly rendering service with 32 men, the Raja had out of grace assigned the village bearing a Dowle of Rs. 203-8 with a kattubadi of Rs. 37-8 payable out of the same and measuring 150 acres 36 cents as service grant on condition of their enjoying the same

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at the will and pleasure of the Zamindar as long as he might be pleased. The agreement states that the executants have agreed to be present with 32 men and be rendering such service as was required by the Zamindar paying the kattubadi of Rs. 37-8 in two instalments. It concludes by saying:

"If it comes to notice that we have in any way acted in contravention of your Highness's orders, we agree to your Highness taking away the said village from our possession and getting it annexed to the estate."

A plea was raised in the Lower Court that this document was not executed voluntarily but was got from the executants by coercion. The Subordinate Judge was of opinion that the document was unduly forced upon the executants, that as a contract it had no consideration and that it was not a grant of land by the Zamindar.

There is a great deal to be said in favour of the view taken by the Subordinate Judge when regard is had to the position of the parties, the mode of enjoyment for nearly 150 years and the circumstances that led to the execution of Exhibit A. It is, however, unnecessary for us to go into the question as even assuming that the agreement is binding on the defendants the plaintiff cannot eject them as there is no evidence that the defendants broke any of its terms.

It seems to us, reading Exhibits M-2, M-3 and A together and having regard to the proceedings which led to the execution of these documents, that the Zamindar even if the document was enforceable as a fresh grant would have to prove before he could eject the defendants that they had not been rendering services or had been guilty of any improper conduct.

We agree with Venkatasubba Rao, J., in his opinion that the grant is resumable under Exhibit A only if the grantees commit default in their performance of services, that the grant is one burdened with a condition of service and not one made in lieu of wages and that as the operative part of the deed is clear and unambiguous the resumption can only be on a breach by the defendants of their agreement to render service. The words "at the will and pleasure of your Highness" and "as long as your Highness might be pleased" are only expressions of subservience and cannot, if the operative part of the agreement is considered, be regarded as converting the position of the other party as a mere tenant-at-will. We may in this connection refer to the decision of their Lordships of the Privy Council in *Vizianagaram Maharaja* v. *Suryanarayana*[5] and to

5. (1886) L.R. 13 I.A. 32: I.L.R. 9 M. 307 (P.C.).

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Vizianagaram Maharaja v. *Sitaramarazu*[6]. We must remember that the document was executed over 55 years ago by men in the hills and forest tracts at a place over 500 miles from Madras at that time unconnected by Railway from Madras when the power and influence of the Zamindars over the comparatively primitive inhabitants of the hills was very great and when the facilities of control which the Government now has over Zamindars was not very great.

It was argued that having regard to the various terms used as regards the defendants it should be presumed that the defendants are merely servants remunerated by the produce of the land, but we agree with Venkatasubba Rao, J., in thinking that no inference can be drawn from the use of the words *Mudat, Mustajere* or *Vasathi,* because there are other words like *Mokhasa, Jodi, Kattubadi,* etc., and the lands are described as Inam lands. For example, in Exhibit VII the lands are described as Inam lands and in the remarks column it is said that an annual kattubadi of Rs. 37-8 was fixed. Kattubadi is a revenue term for favourable quit-rent.

In Exhibit VIII, dated the 22nd of August, 1844, when referring to these lands, the following remark appears:—

"Until this village was granted as *Mokhasa* to the Manne people there were no village servants' manyams. After *Mokhasa* was granted Uggina Appanna and others gave land out of their *Vasathi* to the village servants and have been getting their work and Sircar work done by them when required. As until it was granted as *Mokhasa* there were no manyams to village servants, there is no measurement."

This shows that the defendants' ancestors while in their time were granting sub-tenure to the village servants for doing their and Government work, the grant is described as *Mokhasa* grant and it is hardly likely that if the grantees' ancestors were grantees more than 250 years ago and were themselves merely tenants-at-will and servants of the Raja paid for their services by the produce of the land, they would in their turn engage servants for doing Government service and pay remuneration out of their own lands. The probabilities, therefore, are that the grant was the usual grant burdened with service and not a grant resumable at will.

So far as the grantees are concerned, in some of the documents they describe themselves as Vasathidars and in some others as Mokhasadars.

Reliance has been placed on Exhibit R, dated the 29th of September, 1905, as containing an admission made by some of

6. (1895) I.L.R. 19 M. 100.

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these hill men. Little reliance can be placed on this document as the object of it was to get the alienations set aside and for that purpose, as Venkatasubba Rao, J., points out, these people were prepared to make any statement so long as the lands which they had alienated were got back. As pointed out, it is nobody's case that these were jiroyati lands although Exhibit R says so.

We are of opinion that the decision of Venkatasubba Rao, J., is right and dismiss the Letters Patent Appeal with costs.

S.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY.

K. C. Kutty and another .. *Petitioners**
(*Respondents* 1 *and* 2)

v.

Vydiarakath Kunhali Haji and another .. *Respondents*
(*Petitioner and 3rd Respondent*).

Kutty *v.* Vydiarakath Kunhali Haji.

Election petition—Rule 1 *of Rules for the Conduct of Inquiries and Decision of Disputes relating to Elections—Meaning of "having jurisdiction".*

Certain acts complained of relating to an election, *i.e.*, that votes given for the petitioner at the election were wrongly rejected by the President of Taluk Board as invalid and that the President refused to recount the votes when requested to do so, took place at a place *P*. A petition attacking the validity of the election was presented to the Subordinate Judge at *C*, who had jurisdiction over the place where the candates were nominated but not over the place where the alleged irregularities happened. According to Rule 1 of the Rules for the Conduct of Inquiries and Decision of Disputes relating to Elections the petition should be presented to the District or Subordinate Judge "having jurisdiction".

Held, that the expression "having jurisdiction" can only mean having jurisdiction over the place of the acts or omissions complained of.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of South Malabar at Calicut, dated 28th October, 1929 and made in Original Petition No. 8 of 1929.

P. Govinda Menon for petitioners.

B. Pocker and *Kunhamad Kutti* for respondents.

The Court delivered the following

JUDGMENT.—The petition before the Subordinate Judge of Calicut relates to the election of the two respondents before him

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*C.R.P. No. 1719 of 1929. 13th March, 1930.

as members of the Calicut Taluk Board for the Payyoli Firka of the Kurumbranad Taluk. The Subordinate Judge has no jurisdiction over the Kurumbranad Taluk. The election was attacked by the petitioner before the Subordinate Judge on the ground that votes given for him at the election were wrongly rejected by the President of Taluk Board as invalid and that the President refused to recount the votes when requested to do so. These acts according to the petitioner's allegations took place at Payyoli. Respondent 1 before the Subordinate Judge, whose election was attacked, is the petitioner here, and he urges that the Subordinate Judge of Calicut had no jurisdiction to hear an election petition regarding these acts alleged to have taken place at Payyoli outside his local jurisdiction. Under Rule 1 of the Rules for the Conduct of Inquiries and the Decision of Disputes relating to Elections* election petitions must be presented to the District or Subordinate Judge "having jurisdiction". Mr. Pocker for the petitioner before the Subordinate Judge urges that "election" in such cases includes nomination, as decided in *Selvaranga Raju* v. *Doraiswami Mudaliar*[1] and that the nomination of the candidates in this case was admittedly in Calicut, that the allegations of his client are really against the President of the Taluk Board, whose office is in Calicut, and that under the rules notice of such petition must be served on the President of the Board. For these reasons he contends that the Subordinate Judge of Calicut had jurisdiction in this matter, though the votes were rejected and the recount refused and both the respondents before the Subordinate Judge resided outside his jurisdiction. Rule 1 does not say that the petition can be presented to the District or Subordinate Judge having jurisdiction over the election or over any place where any act included in the term "election" is done, but merely to the District or Subordinate Judge "having jurisdiction". In my opinion, though the matter is not very clear, that means having jurisdiction over the place of the acts or omissions complained of. In this case, therefore, the Subordinate Judge of Calicut had no

1. (1929) 57 M.L.J. 241 (F.B.).

**Rule* 1.—Save as provided in S. 57 of the Madras Local Boards Act, 1920, no election held under the Madras Local Boards Act, whether of a member or president of a district board, a taluk board or a union board, or a vice-president of a district board or taluk board, shall be called in question except by an election petition presented, in accordance with these rules, to the district or subordinate judge having jurisdiction by any candidate or elector against the candidate (hereinafter called the returned candidate) who has been declared by the president of a local board to have been duly elected. . . . . . .

Kutty. v. Vydiarakath Kunhali Haji.

jurisdiction to hear the petition in question. His order is set aside, and the petition before him is dismissed.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Tholeti Ramiah and another .. *Appellants** (*Plffs.*)

v.

Konala Brahmiah and others .. *Respondents* (*Defts.*).

Ramiah v. Brahmiah.

Limitation Act (IX of 1908), S. 6 (3) and Art. 44—Alienation by mother and guardian of minor—Death of ward as infant—Mother succeeding as heir—Death of mother without seeking to set aside alienation—Suit by reversionary heir for possession of property sold—Limitation.

The mother and guardian of a minor sold certain property belonging to the ward in 1873, and, the ward having died an infant in 1879 or 1880, she succeeded to his other property and died in 1921 without taking steps to set aside the alienation. A reversionary heir instituted a suit in 1922 to recover possession of the property sold from persons holding under the original vendee.

Held, that the suit was barred by limitation because of S. 6 (3) read with Art. 44 of the Limitation Act. The suit became barred on the lapse of three years after the death of the ward, notwithstanding the fact that he was succeeded by a female heir.

Sundrammal v. *Rangasami Mudaliar,* (1894) I.L.R. 18 Mad. 193: 4 M.L.J. 275, followed.

Second appeal against the decree of the District Court of West Godavari at Ellore in Appeal No. 117 of 1926 preferred against the decree of the Court of the Additional District Munsif of Ellore in O.S. No. 19 of 1924 (O.S. No. 522 of 1922, Principal District Munsif's Court, Tanuku).

G. Lakshmanna and *K. Kameswara Rao* for appellants.

V. Govindarajachari for respondents.

The Court delivered the following

JUDGMENT.—Mr. Lakshmanna has argued this case at great length, but I am afraid I cannot uphold his contention. The facts may be briefly stated. The property belonged to Ramiah, who was the last full owner. During his minority, his mother, acting as his guardian, sold the property in 1873 to a person through whom the defendants claim. Ramiah died whilst still an infant in 1879 or 1880. After his death, his mother, as his heir, took possession of his other property and died in 1921. This suit was brought in 1922 by a reversionary heir for recovery of the suit item. Both the Lower Courts have held that

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*S.A. No. 1636 of 1926. 21st February, 1930.

the suit is barred by limitation. Mr. Lakshmanna contends that this decision is wrong.

Article 44 of the Limitation Act runs thus:

Description of Suit.	Period of Limitation.	Time from which period begins to run.
By a ward who has attained majority, to set aside a transfer of property by his guardian.	Three years.	When the ward attains majority.

Mr. Lakshmanna's argument is, that as the ward died before he came of age, this article does not apply. He puts his case thus. The minor's right to recover the property would, but for this article, not be barred till the expiry of twelve years from his attaining his majority. The case would fall under Article 144. The transaction being voidable and not void, the possession of the alienee does not become adverse till the ward by coming of age becomes competent either to ratify or repudiate. (See *Shankerbhai* v. *Raisingji*[1] and *Churcher* v. *Martin*.[2]) The effect of Article 44 is, that the ward on attaining majority must elect within three years either to be bound or not to be bound by the transaction. The period of limitation is thus curtailed in his case. But as Article 44 applies in terms only to a ward who comes of age, his heir is not similarly restricted and can sue for possession without getting rid of the transaction. I think I have correctly set forth the somewhat ingenious contention of Mr. Lakshmanna. It amounts to this: that if the heir of the minor dying before attaining his majority happens to be a male, he has, under Article 144, twelve years from the minor's death within which he may bring the suit. The heir, unlike the ward, is not bound to remove the instrument from his path and is not trammelled by the three years rule. Again, according to Mr. Lakshmanna's contention, when the heir of a ward dying an infant happens to be a female, the reversioner who succeeds her, has, from her death, twelve years within which he can sue for possession. Can this contention be accepted? The minor on attaining full age cannot dislodge the alienee from the property without first clearing out of his way the deed of transfer executed by his guardian. (*Doraisami* v. *Thangavelu*.[3]) This rule applies also to the heir

1. (1917) 19 Bom. L.R. 855. 2. (1889) 42 Ch. D. 312.
3. A.I.R. 1929 M. 668.

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of the ward who dies after attaining his majority. It equally applies to an assignee who takes a transfer from such a ward. (*Raja Ramaswami* v. *Govindammal*[4].) Is there then any reason why an exception should be made in the case of the representative of a ward who dies while still an infant? According to Mr. Lakshmanna's contention, the heir of a minor dying an infant is in a better position than the minor himself. The present case shows to what startling result this position may lead. Though the suit would have long ago been barred had the minor attained full age and died, the law must treat the claim as being alive, for the benefit of his successor, after the lapse of 50 years. There is nothing, in my opinion, in the Limitation Act which compels me to uphold such a contention.

The question is, when does the cause of action arise to set aside the transfer? Does it arise on the date of the alienation or when the ward comes of age? Article 44 no doubt fixes the starting point as the attaining by the infant of his majority. In my opinion, that article does no more than express the result of applying to the particular kind of case it contemplates the general principles embodied in sections 6 and 8 of the Limitation Act. The statute begins to run from the date of the alienation, but section 6 makes minority a cause for suspending the operation of the statute. Now, let us suppose that Article 44 ran thus:—

Description of Suit.	Period of Limitation.	Time from which period begins to run.
By a ward who has attained majority, to set aside a transfer of property by his guardian.	Three years.	From the date of the transfer.

Let us apply to it the rules contained in sections 6 and 8. Section 6 says, "where a person is at the time from which the period of limitation is to be reckoned a minor, he may institute the suit within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule". Section 8 enacts that "nothing in section 6 shall be deemed to extend for more than three years from the cessation of the disability, the period within which any suit must be instituted." The provision

4. (1928) 56 M.L.J. 332.

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as given above in its altered shape, read in the light of these two sections, yields the rule in the exact form embodied in Article 44 as it stands. The reason for drafting this article in this manner is obvious. The other articles of the Limitation Act may apply to minors or to adults, but by its very nature the transaction referred to in Article 44 concerns minors only. It was, therefore, unnecessary to frame a rule in general terms, leaving it to be governed by the principles contained in sections 6 and 8. Art. 44 seems to be the result of an attempt to state the law compendiously in a self-contained provision. This is the view I am disposed to take and it receives support from the observations of Mr. Justice Sadasiva Aiyar in *Doraisami* v. *Nondisami*[5], a case decided by a Bench of three Judges. The learned Judge, after remarking, that even before the ward attains his majority, a suit can be brought on his behalf by a next friend to set aside the transaction and that the ward is bound by the result of such a suit, if honestly brought and conducted, goes on to observe,

"This seems to indicate that the cause of action to set aside the alienation arises at once."

The learned Judge thus continues:

"It seems difficult to hold that there are two separate causes of action given to the ward to set aside an alienation of the ward's property by the guardian—

(*a*) One cause of action which arises at once to be enforced by a suit brought by anybody acting as his next friend during the whole course of his minority, and

(*b*) another distinct cause of action which arises as soon as he attains majority (and only on the date of his so attaining majority and not before) to be enforced by a suit brought by himself as a major.

If there is only one cause of action which arises on the date of alienation, it seems to follow (as Abdur Rahim, J., has remarked) that Article 44 is only an illustration of the principle embodied in section 7 (corresponding to section 6 of the present Act)."

If this be the correct view to take of Article 44 (I entertain no doubt on the point) section 6, clause (3) comes into play. It runs thus:

"Where the disability continues up to the death of such person, his legal representative may institute the suit within the same period after the death as would otherwise have been allowed from the time so prescribed."

The limitation is, therefore, to be reckoned from the death of the ward. In that case, the fact that on his death the estate is taken by a female heir, makes no difference. As observed

5. (1912) I.L.R. 38 M. 118: 25 M.L.J. 405 (F.B.).

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in *Seetaramaraju* v. *Subbaraju*[6], under the provisions of the Limitation Act, minority does not by itself prevent limitation from running against the minor although, by reason of the disability, an extended period is given. When the statute once begins to run, no subsequent event, not specially provided for, impedes its operation (section 9). The suit, therefore, became barred on the lapse of three years after the death of the ward, notwithstanding the fact that he was succeeded by a female heir.

In this view, the question regarding the scope of Article 141 does not arise. If time had commenced to run during the lifetime of the ward himself, Article 141 is clearly inapplicable. I do not, therefore, propose to consider any cases bearing on that provision.

Mr. Lakshmanna has not been able to cite any authority for his contention. It is opposed to *Sundrammal* v. *Rangasami*[7], the facts of which are on all fours with those of the present case. The alienation in that case was made in 1861 by the adoptive mother acting as the guardian of her infant son. On his death before attaining majority the mother entered into possession and enjoyed the properties till she died in 1890. The suit was filed by the reversionary heir in 1891. It was held that the claim was barred. The following passage contains the reason:—

> "He finds as a fact that the alienation was made by Muttammal and her minor son and that what was conveyed was an absolute estate. As the last male owner was alive the alienation was not that of a widow's estate by a widow but that of an absolute estate by the guardian of the last male owner. It was open to any next friend of his to have stepped forward during his minority and set aside the alienation on the ground that it was an act done without adequate necessity or in excess of the limited authority of a guardian. As the alienation took place in 1861 whilst the present suit was brought in 1891, a suit to set it aside would be barred, if the minor were still alive and his reversioners cannot take a higher position. The plaintiff's claim must, therefore, be held to be time-barred."

Mr. Lakshmanna says that the judgment is very brief and that the decision is wrong. The decision is, in my opinion, correct though the learned Judges did not discuss the point at any length.

The second appeal fails and is dismissed with costs.

B.V.V. *Second appeal dismissed.*

6. (1921) I.L.R. 45 M. 361: 42 M.L.J. 262.
7. (1894) I.L.R. 18 M. 193: 4 M.L.J. 275.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD THANKERTON, SIR LANCELOT SANDERSON AND SIR BINOD MITTER.

Mayasankar Bhagwanji .. *Appellant**

v.

Sachindra Mohan Ghosh .. *Respondent.*

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Mayasankar Bhagwanji *v.* Sachindra Mohan Ghosh.

Decree—Consent decree for money—Execution of—Bar of right of—Conditions to be observed by judgment-debtor so as to operate as—Fulfilment of—Evidence of—Effect of.

A consent decree for money provided that the plaintiff would not be competent to execute the decree within six months, and that if the defendant executed a patta in terms of a certain agreement and the plaintiff executed a kabuliyat in similar terms the plaintiff would not be competent to realise the decree-money from the defendant, and that otherwise the plaintiff would be competent to realise the decree-money from the defendant by executing the decree after the expiry of the said six months.

On an application for execution made by the appellant (plaintiff) for realisation of the decretal amount by sale of certain properties described therein, *held*, affirming the High Court, that the respondent (defendant) had always been ready and willing to execute the patta, that the appellant had wrongfully prevented him from doing so, and that the appellant was not, therefore, entitled to execute the decree as a money-decree.

Consolidated appeal No. 38 of 1929 from one judgment and two decrees, dated the 27th April, 1928, of the High Court, Patna (Das and Adami, JJ.), which reversed two orders, dated the 7th January, 1928 and 3rd March, 1928, of the Subordinate Judge of Dhanbad.

The main question for determination on the present appeal was, whether the appellant was entitled to execute a consent decree for money, dated the 15th February, 1926, in the events which had since happened. The Subordinate Judge answered the question in the affirmative, but the High Court took the contrary view.

The facts of the case, and the material portion of the consent decree in question, are sufficiently fully set out in their Lordships' judgment.

Dunne, K.C., Dube and *B. B. Joshi* for appellant.

De Gruyther, K.C. and *Parikh* for respondent.

20th February, 1930. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—These are two appeals (consolidated) from one judgment and two decrees, dated the 27th

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*P.C. Appeal No. 38 of 1929. 20th February, 1930.
Patna Appeals Nos. 25 and 26 of 1928.

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of April, 1928, of the High Court of Judicature at Patna, which reversed two orders, dated the 7th of January, 1928, and 3rd March, 1928, of the Subordinate Judge of Dhanbad.

The appellant is a decree-holder, and the above-mentioned orders of the Subordinate Judge were made on two applications by the appellant for the execution of a consent decree, dated the 15th February, 1926, and made in a Suit No. 72 of 1924, which was brought by the appellant against the respondent, Raja Shri Shiv Prasad Singh (hereinafter called "the Raja").

The respondent, S.M. Ghosh, was appointed on the 22nd of December, 1927, Receiver of the Jharia Raj by the High Court of Calcutta in a suit brought by the Ranees of the late Raja against the Raja.

On the 7th March, 1916, the Raja succeeded to the Jharia Raj.

On the 6th March, 1919, the widows of the late Raja (hereinafter referred to as the Ranees) sued the Raja in the Court of the Subordinate Judge, Alipore, for possession of the Jharia Raj.

On the 3rd November, 1921, the Subordinate Judge at Alipore dismissed the Ranees' suit and the Ranees appealed against that decree to the High Court at Calcutta.

By two agreements, dated the 16th and 18th November, 1921, during the pendency of the Ranees' appeal, the appellant agreed to take from the Raja, who agreed to grant, mining leases in respect of 1,050 *bighas* of land, in *mouza* Barki Bowa, one of the villages of the Jharia Raj, on the terms and for the consideration therein mentioned.

The Ranees thereupon obtained an order from the High Court at Calcutta restraining the Raja from executing any mining *patta* in favour of the appellant.

On the 14th November, 1924, the appellant brought Suit No. 72 of 1924 in the Court of the Subordinate Judge, Dhanbad, against the Raja for a decree for specific performance of the said agreements, or, alternatively, for a decree for Rs. 1,89,313.

On the 10th February, 1926, the High Court at Calcutta gave the Raja permission to grant a lease to the appellant in the following terms:—

"Permission is granted to the petitioner to grant a lease to Mayasankar Bhagwanji on the terms mentioned in the petition subject to the following conditions:—

"1. That the lease will be without prejudice to the rights of the plaintiffs (meaning the Ranees) if any.

"2. That the defendant (meaning the Raja) will bring into Court all rents and royalties which he may receive under the proposed lease.

"3. That the defendant (meaning the Raja) will procure a report within a month from either Bird & Co. or Jardine Skinner & Co. estimating the value of the coal which may reasonably be extracted from the lands proposed to be demised within three years from date having regard to the present conditions of such land, and the defendant further undertakes that he will furnish security within a fortnight of the date of the report to the satisfaction of this Court for the amount so reported."

On the 15th February, 1926, the appellant and the Raja entered into a compromise in Suit No. 72 of 1924, and on the same date the Subordinate Judge of Dhanbad passed a consent decree, of which the material portion was as follows:—

"1. That the plaintiff will get a decree for Rs. 1,40,353 (one lac forty thousand three hundred and fifty-three) and Rs. 2,701-14-9 pies as costs therefor, *i.e.*, in proportion thereto.

"2. That the plaintiff will not be competent to execute the said decree within six months from this day, and if the defendant according to the order of the Honourable Calcutta High Court, dated the 10th February, 1926, executes a *patta* in terms of the agreement and the plaintiffs execute a *kabuliyat* in similar terms the plaintiff will not be competent to realise this decree-money from the defendant. Otherwise the plaintiff will be competent to realise the decree-money by executing this decree after the expiry of the said six months and with interest at the rate of 8 annas per cent. per month from the date of the decree from the defendant. To that the defendant will not be competent to raise any objection."

On the 10th March, 1926, it was reported by Mr. Bathgate to the Calcutta High Court that no coal could possibly be extracted within three years of the order of the 10th February, 1926, and on the 22nd March, 1926, the said High Court made the following order:—

"Let the report of the 10th March, 1926, made by Mr. Bhagat (? Mr. Bathgate) be recorded. It is not necessary in our judgment to make any further order except that we make it clear that no security need be given at present. As the learned Advocate-General on behalf of his client (meaning the Raja) has no objection we add that the appellants (meaning the Ranees) shall have liberty to apply."

On the 19th of April, 1926, the pleader for the Raja sent a draft *patta* to the pleader for the appellant for approval, and asked for a *kabuliyat* in the terms thereof, but the latter failed to comply with that request. Correspondence took place in June, 1926, between the pleader for the appellant and the pleader of the Raja. The appellant's pleader, however, refused to accept the *patta*.

The ground taken on behalf of the appellant was that the draft was not in accordance with the consent decree of the 15th

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of February, 1926, and that the order of the Calcutta High Court, dated 22nd March, 1926, for which the Raja was alleged to be mainly responsible, had made the execution of the *patta* by the Raja according to the terms of the consent decree, impossible.

The Raja's pleader asserted that the draft *patta* was in accordance with the said consent decree, and suggested that the appellant's pleader should send a draft of his own or alter the draft which had been submitted, so as to bring it into conformity with the terms of the decree, and stated that he would accept the same. The appellant's pleader did not comply with the last-mentioned request, but repeated the objection that the execution of the *patta* by the Raja in accordance with the terms of the consent decree had become impossible.

It appears that the High Court of Calcutta, on the hearing of the Ranees' appeal in August, 1925, dismissed the Ranees' claim to the Jharia Raj, but allowed it in respect of the self-acquired properties of the late Raja, and remanded the suit to the Subordinate Judge of Dhanbad to ascertain what those properties were, and on the 7th May, 1927, the Subordinate Judge held that the village of Bowa, both as regards the surface and underground, was the self-acquired property of the late Raja, and made a decree for possession in favour of the Ranees.

The matters in dispute between the Raja and the Ranees are the subject of an appeal to His Majesty in Council now pending.

On the 9th August, 1927, the appellant made the application (Execution Case No. 464 of 1927) giving rise to the second appeal, for execution of the compromise decree for realization of the decretal amount. The Raja filed objections opposing the application, but on the 7th January, 1928, the Subordinate Judge made an order dismissing the Raja's objections. The Raja thereupon appealed to the High Court of Judicature at Patna. The appellant's application for execution was, however, struck off on the 24th January, 1928.

On the 25th January, 1928, the appellant made another application for execution (Execution Case No. 49 of 1928), giving rise to the first appeal for realization of the decretal amount by sale of certain properties described therein.

On the application of the Raja the Subordinate Judge made the Receiver, who was in possession of the property proposed to be sold, a party to the last-mentioned application. The

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Receiver filed objections to the application, contending that the appellant was not entitled to execute the compromise decree as a money-decree on the grounds that the Raja had submitted a draft *patta,* but the appellant failed to approve it, and thus prevented the Raja from executing the *patta,* that the appellant was therefore not entitled to take advantage of his own default by executing the decree as a money-decree, that the Raja had always been ready and willing to execute the *patta,* and that there was no difficulty in granting the *patta* with the permission of the Calcutta High Court.

On the 3rd March, 1928, the Subordinate Judge of Dhanbad made an order disallowing the Receiver's objection and allowing the appellant's application for execution to proceed. In making the order he followed his previous order of the 7th January, 1928, disallowing the Raja's objections. The learned Subordinate Judge held that the order of the Calcutta High Court, dated the 10th February, 1926, directing the Raja to furnish security, was intended to indemnify the appellant in case it should be held that the property to be leased belonged to the Ranees and not to the Raja; that the Raja by his conduct in consenting to the order of the 22nd March, 1926, giving the Ranees liberty to apply for security, prejudiced the position of the appellant, and consequently the appellant was justified in refusing to approve the draft *patta;* that by the decree of the 7th May, 1927, of the Subordinate Judge of Alipore, the title to the property to be leased was with the Ranees, and not with the Raja; and that the Raja by his conduct had made the condition for the execution of the *patta* impossible of performance, and consequently the decree for the payment of money by the Raja must be given effect to, and that the execution must be allowed to proceed.

Against the said order of the 3rd March, 1928, the Receiver appealed to the High Court of Judicature at Patna. His appeal and the appeal of the Raja were heard together and disposed of by one judgment delivered on the 27th April, 1928. The learned Judges held that under the terms of the consent decree the appellant had not reserved to himself the right to refuse to execute a *kabuliyat;* that the order of the Calcutta High Court did not affect the appellant's position, and, if anything, it was more favourable to him than the order of the 10th February, 1926, of the said High Court; that the decree, dated the 7th May, 1927, of the Subordinate Judge of Alipore, which was under appeal, did not affect the rights of the parties under

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the consent decree, because the appellant had agreed to take the mining lease during the pendency of the litigation between the Raja and the Ranees; that the Receiver had agreed to apply for leave to execute the *patta* on behalf of all the parties and under a *patta* so executed the title of the appellant would be complete; and that the appellant was not entitled to execute the consent decree as a money-decree. In the result they allowed the appeals with costs in both Courts, set aside the orders appealed from and dismissed the appellant's applications for execution.

Against this decree of the High Court the appellant has lodged the present appeal. At the hearing it was not contended that the decree of the Subordinate Judge which decided that the village of Bowa was the self-acquired property of the late Raja, and which gave possession thereof to the Ranees, affected the rights of the parties under the consent decree. It is obvious that the appellant agreed to take the lease while litigation between the Raja and the Ranees of the late Raja was pending with respect to the Raj, of which the village in question was alleged to be part, and the appellant must be taken to have known of the Ranees' claim with respect thereto, and to have agreed to take the lease for what it was worth. It is also to be remembered that the aforesaid litigation has not yet been finally determined in view of the appeal to His Majesty in Council.

The only point argued on behalf of the appellant before the Board, shortly stated, was that by reason of the order of the High Court of Calcutta, dated the 22nd of March, 1926, the Raja was not in a position to execute a *patta* in accordance with the terms of the consent decree of the 15th of February, 1926.

It was argued that the Raja, by consenting to the order of the 22nd March, 1926, of the Calcutta High Court in the Ranees' suit, had altered the position contemplated at the time of the consent decree in the appellant's suit. It was said that it was then intended that such security as should be necessary should be given within a fortnight of the date of the report, mentioned in the order of the 10th February, 1926; that this was varied by the terms of the 22nd March, 1926, and that if the appellant worked the colliery vigorously and did succeed in raising coal, the Ranees would insist on security being given by the Raja, who might or might not give the same, whereby the position of the appellant was altered and prejudiced.

Their Lordships are unable to accept this argument.

They are of opinion that the Raja, by consenting to the terms of the order of the High Court of Calcutta, dated the 22nd March, 1926, did not render it impossible for him to grant a lease in accordance with the terms of the consent decree, dated the 15th February, 1926, and they are further of opinion that in fact the Raja was prepared and did offer to grant a lease in accordance with the said consent decree.

It is necessary to refer again to the terms of the said consent decree, dated the 15th February, 1926. It provided among other matters, that if the Raja, according to the order of the Calcutta High Court, dated the 10th of February, 1926, executed a *patta* in terms of the agreement . . . the appellant would not be competent to realise the decree-money from the Raja.

The important words relating to the question now under consideration are, "According to the order of the Honourable Calcutta High Court, dated the 10.2.26." On reference to the order of the 10th February, 1926, which was made in the Ranees' suit against the Raja, it appears that permission was thereby granted to the Raja to grant a lease to the appellant on the terms mentioned in the petition, subject to the conditions therein stated. There is no suggestion that the terms of the draft *patta* were not in accordance with the terms mentioned in the petition. What, then, were the conditions? They have already been fully stated.

Nothing turns upon the first condition. The second amounts to an undertaking by the Raja to bring into Court the rents and royalties which he may receive under the lease.

The third refers to two undertakings by the Raja, *viz.*, (*a*) that he will procure within a month the report therein mentioned, and (*b*) that he will furnish security within a fortnight of the date of the report to the satisfaction of the Court for the amounts so reported.

The Raja gave these undertakings. Upon the Raja giving these undertakings, the conditions imposed by the Court were fulfilled and the permission to grant a lease became complete and effective.

It so happened that the report was to the effect that no coal could possibly be extracted within three years, and consequently the High Court of Calcutta directed, on the 22nd March, 1926, that no security need then be given; but in order to protect the

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interests of the Ranees, and with the consent of the Raja, liberty to apply was given to the Ranees. The liberty to apply so granted to the Ranees did not in any way affect or invalidate the permission to grant a lease which the Court had given to the Raja on the 10th February, 1926, and which became effectual when he gave the undertakings required by the Court.

If the Raja had failed to carry out the undertakings given by him, or any of them, the Raja might have become liable to the sanction of the Court, but the validity of the lease, if granted by him with the permission of the Court, would not have been affected thereby.

For these reasons their Lordships are of opinion that the decree of the High Court was correct, and that this appeal should be dismissed with costs.

They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Watkins & Hunter.*

Solicitors for respondents: *Stanley Johnson & Allen.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD MACMILLAN, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Rampati Chatterjee and others .. *Appellants**

v.

Ramani Mohan Sen and others .. *Respondents.*

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Possession—Submergence of land—Effect of, on owner's possession.

Mere submergence of land will not put an end to its owner's possession.

Consolidated appeal No. 44 of 1927 from eight decrees of the High Court, Calcutta, dated the 4th December, 1924, which modified eight decrees of the Court of the Second Subordinate Judge, Burdwan, dated the 17th August, 1918.

Raikes, K.C. and *McNair* for appellants.

De Gruyther, K.C. and *Dube* for respondents.

10th April, 1930. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The respondents in this appeal are the *putnidars* of Mouzas Panuhat and Ekaihat. They

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*P.C. Appeal No. 44 of 1927. 10th April, 1930.
Bengal Appeals Nos. 16—23 of 1925.

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filed a series of rent suits against the appellants as *dar-putnidars* holding lands under them in these *mouzas*. The appellants defended the suits, claiming abatements of rent on various grounds, and also filed cross-suits alleging that they had been deprived by the respondents of certain lands included in their *dar-putni* leases, and claiming on this account an entire suspension of rent, or in the alternative an abatement in respect thereof. The respondents denied that these lands and certain other lands in respect of which the appellants claimed an abatement on the ground of diluvion (all of which will be referred to for convenience as "the disputed lands") were included in the *dar-putnis*. The claim for suspension was negatived by both Courts in India, and has been abandoned before this Board, leaving the question of abatements of rent for decision here. All the suits were tried together before the Subordinate Judge of Burdwan, who allowed abatements under various heads, including the claim to the disputed lands, which he held were included in the *dar-putnis*. On appeal the High Court disagreed with the Subordinate Judge as to the disputed lands and reduced the abatements accordingly.

The question as to these lands arises as follows. Mouzas Panuhat and Ekaihat lie in an area which is from time to time subjected to diluvion by the action of the Bagirathi (Ganges). Lands are constantly being washed away and constantly reforming on one side or the other of the river, and the boundaries at any given time are in consequence difficult of identification. The earliest maps available are those of the Thak survey of 1855, three sheets of which are involved in the ascertainment of the two *mouzas*. Sheet No. 80 delineates an area, the residue of which, excluding certain *chakran* plots, is shown as appertaining to Panuhat. The residuary area of Sheet No. 5 in the same way is shown as Ekaihat. There is no dispute that all the residuary lands so shown on these two sheets are included in the respective *dar-putnis* of the two *mouzas*. The dispute begins with the third sheet which is headed *"Thakbust map No. 3 of the accreted chur of the River Bagirathi . . . in district Burdwan, Police Station and munsif Catchary Katwa . . . ."* It shows two *chaks* or parcels, numbered 6 and 15, which belong to Panuhat, and two *chaks* Nos. 18 and 19 and a residuary *chak* which belong to Ekaihat. This appears to be the case of both parties, the dispute being whether the whole or only portions of the lands so shown on Map No. 3 were included in the *dar-putni* leases. The Subordinate Judge says that

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before him the *putnidars* (respondents) urged that *chaks* 6, 15, 18 and 19 were excluded from the *dar-putnis*, the dispute therefore covering all the lands on Map No. 3. Before this Board (and apparently also in the High Court), the respondents have confined their contentions to such portions of Nos. 15, 18 and 19 and the residuary *chak* as were in 1886, when the *dar-putnis* were created, either under the river as it then ran, or left or reformed on the far side of it from the lands shown on sheets 5 and 80, and it is only with these lands that their Lordships have to deal.

In 1886 the *putnidars* were the Land Mortgage Bank of India, Ltd., who in that year executed *dar-putni pottahs* of both *mouzas* in favour of the predecessor-in-title of the appellants, and in 1893 sold the *putni* rights in both *mouzas* to the predecessor-in-title of the respondents. The respondents admit that the disputed lands were included in the bank's *putni* and claim title to them under their transfer from the bank, but they deny that they were included in the preceding *dar-putnis* created by the bank on the ground that they were then either totally submerged or cut off by the river from the rest of the *mouzas*.

It is manifest that this question must depend primarily on the terms of *pottahs* and *kabuliyats* upon which the appellants hold, and it is really upon this point that the two Courts have differed, as will appear from the following quotation from the judgment of the High Court:—

"The decision of this question primarily depends upon a proper construction of the two leases. The Subordinate Judge in his judgment observes: 'Though the Kabuliyats do not contain the area of boundaries, they still contain the significant condition to the effect that the area of the lands of which dur-putni settlements were granted would be according to the Thak and Survey Map.' He then proceeds to find that certain Chaks in the Thak maps of different Mouzas contiguous to the two Mouzas in question were according to the statements on those Thak maps parts of the Mouzas Panuhat and Ekaihat as Chitta lands appertaining to those two mouzas and thereupon holds that those lands must be considered to have been demised under the putni leases. In my opinion, if his premises were correct, his conclusion would be also correct and unassailable. The whole difficulty is that there is no mention in the Kabuliyats that the areas of the lands would be according to the Thak maps."

The original *pottahs* and copies of the *kabuliyats* were produced at the trial. The *pottahs*, which were old and somewhat tattered documents, were returned to the appellants. This was no doubt in accordance with the usual practice, but their Lordships think that care should always be taken in such cases to retain certified copies on the record. The failure to take this precaution in the present case has added materially to the

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expense and prolongation of this unfortunate litigation. The copies of the *kabuliyats,* which were produced by the respondents, and which were no doubt translated for the use of the High Court, were, it is now admitted, defective. The Board have before them correct translations of the *pottahs* and of the registration copies of the *kabuliyats.* These have not been objected to by the respondents, and it is upon them that the decision must be come to, and their Lordships have no doubt that the Subordinate Judge was right in his interpretation of them. In each case, the *dar-putni* purports to be of the *mouza* as owned and held by the bank without any reservation. Ekaihat being said to include "the *chur* reformed after diluvion," and in each case it is provided that the *dar-putnidar* is to "maintain intact the area of the said *mouza* as ascertained in bighas in the *Thak* survey and the limits and boundaries as laid down in the survey map." It is admitted that "survey map" in this connection means the *Thakbust* maps above referred to.

It is, in their Lordships' opinion, clear from these provisions that the *dar-putni* leases of 1886 covered all that is shown upon the three maps as appertaining to Panuhat and Ekaihat, and this, as stated above, admittedly includes the disputed lands. In coming to this conclusion, their Lordships have the satisfaction of knowing, from the passage quoted above from the High Court's judgment, that if the learned Judges of that Court had had the proper materials before them they would have concurred with the judgment of the Subordinate Judge upon this question.

One other point only need be referred to in this connection. It is stated in the judgment of the High Court that the disputed lands "are not situated within the sub-division Cutwa (Katwa), or within the district of Burdwan," and that they "appear not to have been in the possession of the *putnidar* at the time when the leases were granted." Their Lordships do not think that in any case, these considerations could outweigh or that the learned Judges (if they had had the *pottahs* and true copies of the *kabuliyats* before them) would have held them to outweigh, the clear terms of the documents. But it is at least possible that this misdescription—if it was in fact a misdescription in 1886, though this has not been established before their Lordships—was taken from the heading of Thak Map No. 3. With regard to the question of possession, their Lordships would be unable to hold that the mere submergence of the land

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would put an end to the bank's possession: see *Kumar Basanta Roy* v. *Secretary of State for India.*[1]

It has been suggested on behalf of the appellants that the question of inclusion or non-inclusion of the disputed lands in the *dar-putni* leases is the only question outstanding between the parties, and that it would follow from its decision in the appellants' favour that the decrees of the Subordinate Judge in all the suits should be restored. It is true that this is the only point discussed in the judgment of the High Court, but their Lordships are not satisfied that the passage quoted above from that judgment necessarily carries the implication for which the appellants' counsel contends. Mr. De Gruyther, for the respondents, has raised other questions of considerable complexity which in his submission must be decided before a final determination of this appeal can be reached, but in view of the conclusion to which their Lordships have come upon this part of the case it is only necessary to refer to them shortly.

The *pottahs* and *kabuliyats* fix a consolidated rent for each *mouza*, which was arrived at after verification of the gross collections, and they provide for a triennial revision on which the *dar-putnidars* will be entitled to remission of rent of any area found to have been washed away, and will be bound to pay additional rent for any area found to have accreted. Upon these provisions it is argued that before any abatement can be allowed on account of diluvion it must be shown that the diluviated area either was part of the rent-producing area in 1886, or upon subsequent accretion has been assessed to additional rent, and this, it is said, has not been established in respect of any part of the disputed lands, the whole of which according to Mr. De Gruyther's contention were submerged in 1886.

The larger part at all events of the disputed lands, in respect of which the Subordinate Judge has allowed abatement of rent on account of dispossession is reformed land falling under the residuary *chak* of Mouza Ekaihat shown on Map No. 3. This *chur* land was taken possession of by third parties, known as the Banerjees, but whether by dispossession of the appellants or not is left in uncertainty. The respondents filed a suit against the Banerjees asserting their title to the *chur* as being included in their *putni* holding. They subsequently compromised the suit on the terms that the Banerjees were maintained in possession paying rent for the land to the respondents.

1. (1917) L.R. 44 I.A. 104: I.L.R. 44 C. 858: 32 M.L.J. 505 (P.C.).

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As between the appellants and the respondents their Lordships have held that these lands are included in the appellants' holding, and it is clear that they have been deprived of their use by the action of the respondents. But it is now contended on behalf of the respondents that the only remedy open to the appellants in respect of this deprivation is by a suit for recovery of possession, and that their claim for abatement of rent on this head is wholly misconceived.

It has not been made clear to their Lordships that these contentions were formulated before either of the Courts in India; they certainly are not dealt with by the High Court, or even referred to in their judgment, and it may well be that they are not now open to the respondents. They are, however, questions of some importance and possibly of considerable difficulty, and their Lordships think that they ought not to dispose of them without their having been submitted to the judgment of the High Court, and in this view Counsel on both sides concur. Their Lordships greatly regret that this further prolongation of an already protracted litigation should be necessary, but they feel that under the circumstances it is unavoidable. They will, therefore, humbly advise His Majesty that the decrees of the High Court in all the suits should be set aside, and that the case should be remitted to the High Court for the consideration of the following questions if in the opinion of the High Court they are properly open to the respondents, *viz.*:—

(1) Whether it is established that the lands in respect of which abatement of rent was decreed by the Subordinate Judge were not taken into account in fixing the rents to be paid under the *dar-putni* leases, and if so whether no such abatement should be allowed; and

(2) Whether the appellants having been dispossessed of part of their holding abatement of rent can be awarded to them in respect thereof;

and to pass such decrees in the said suits as may be just and proper.

The respondents must pay the costs of this appeal. The costs of the appeals in the High Court will be dealt with by that Court after the further hearing.

Solicitors for appellants: *Watkins & Hunter.*

Solicitors for respondents: *W. W. Box & Co.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Appellate Division of the Supreme Court of Ontario.]

PRESENT:—LORD CHANCELLOR, LORD DARLING, LORD MERRIVALE, LORD TOMLIN AND MR. JUSTICE DUFF.

The Erie Beach Company, Limited .. *Appellants**

v.

The Attorney-General of Ontario .. *Respondent.*

P. C.

The Erie Beach Company, Limited *v.* The Attorney-General of Ontario.

Tax—Direct and indirect taxes—Distinction—Test—Joint Stock Company—Shares of—Local situation of, for purposes of liability to or immunity from local taxation—Test.

When transfer of shares in a Joint Stock Company must be effected by a change in the register, the place where the register is required by law to be kept determines the local situation of the shares in order to decide as to liability to or immunity from local taxation. The crucial inquiry is—"Where could the shares be effectively dealt with."

A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and the intention that he shall indemnify himself at the expense of another. The practical distinction between direct and indirect taxation formulated by John Stuart Mill is not a legal definition but a fair basis for testing the character of the tax in question.

Section 10 (2) of the Ontario Succession Duty Act provides: "No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, ... shall be transferred, paid or given to the person entitled thereto until the duty, if any, is paid or security given therefor. Any Corporation or person allowing such a property to be so transferred, paid or given contrary to this sub-section shall be liable for such duty."

Held, the section was a case of direct taxation and not one of indirect taxation.

The Statute makes no provision for reimbursement of the Company from any quarter, and no such provision can be implied.

Appeal No. 41 of 1929 from a judgment and decree of the Appellate Division of the Supreme Court of Ontario.

W. W. Tilley, K.C. and *H. C. Kingstone, K.C.* for appellants.

Wilfred Greene, K.C. and *A. N. Marquis, K.C.* for respondent.

7th November, 1929. Their Lordships' judgment was delivered by

Lord Merrivale.

LORD MERRIVALE.—The Erie Beach Company, Limited, appeals against the judgment of the Appellate Division of the Supreme Court in an action upon an agreed statement of facts

*P.C. Appeal No. 41 of 1929. 7th November, 1929.

wherein the Company prayed a declaration that certain shares of its capital stock registered in the name of Frank V. E. Bardol, deceased, and other like shares allotable to him under a contract of his with the Company were not upon his death subject to duty under the Ontario Succession Duty Act; a declaration that the Company is not under section 10 of the Act liable to pay duty in respect of a transfer of such shares permitted by the Company before payment of succession duty thereon or security given for the payment of the same; and a declaration that section 10 of the Act in so far as it purports to impose the last-mentioned duty on the Company is *ultra vires* of the Province of Ontario.

Frank V. E. Bardol was at all material times domiciled in the State of New York in the United States of America. The plaintiff Company is incorporated in Ontario under the Ontario Companies Act, 1914, having as its chief object the establishment, ownership and conduct of an amusement park upon a site at the village of Fort Erie on the Canadian shore of Lake Erie, within easy reach of the City of Buffalo. Mr. Bardol was apparently the person chiefly concerned in the undertaking. In consideration of assignments of property made by him to the Company 9,000 preferred and 1,000 ordinary shares of $ 100 each therein, fully paid, were agreed to be issued to him; one hundred of the ordinary shares were issued, ninety-six to him and four to nominees of his. The remainder were to be issued when and as he should direct, and remained unissued at his death in April, 1925. Probate of the will of Frank V.E. Bardol was granted in 1925 in the proper court in the State of New York. The plaintiff company in 1926 issued certificates for the testator's previously unissued shares, but was notified on behalf of the Attorney-General of Ontario that it would be held liable under the terms of the Provincial statutes if it should permit any transfer before succession duty had been paid or secured. Thereupon the Company brought the present action. At first instance judgment was given in its favour, but upon appeal the Court of Appeal was unanimously of opinion against the several contentions raised by the plaintiffs. The Court held the shares to be subject to succession duty, the statute *intra vires* of the Provincial Legislature, and the contingent liability of the Company under section 10 to be well founded in law.

The Ontario Succession Duty Act (R.S.O., 1914, c. 24) by section 7 imposes succession duty on "all property situate in Ontario and any income thereon passing on the death of any

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person, whether at the time of death domiciled'' in Ontario or elsewhere, and no question was raised but that this enactment so far as section 7 goes is within the legislative powers of the Province as a measure of direct taxation within the terms of the British North America Act, 1867, section 92. What was mainly in dispute upon the hearing at this Board was whether the shares in question were assets of the testator situate in Ontario. There was, however, the further question whether, in any view of the matter, section 10 of the statute, imposing liability not upon succession to shares, but upon the Corporation in which the shares exist, without the accrual of any successory interest in them to the Company, is or is not indirect taxation and so beyond the legislative powers of the Province. The material words of section 10 are these:—

''No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, . . . whether such deceased person was at the time of his death domiciled in Ontario or elsewhere, shall be transferred . . until the duty, if any, is paid, or security given therefor, and any Corporation or person allowing such property to be so transferred . . contrary to this sub-section shall be liable for such duty.''

The nature of the property in the shares in question depends in the main—if not wholly—upon the terms of the enactment under which the plaintiff Company subsists: the Ontario Companies Act, 2 Geo. V, c. 31. This statute of the Provincial legislature provides for the grant of incorporation by the Lieutenant-Governor in Council, for purposes whereto the authority of the legislature extends, to be set forth in the petition for incorporation. One of the antecedent requirements for incorporation is a statement by the petitioner or petitioners of a place in Ontario where the head office of the Company is to be situate. The shares are by section 56 to be deemed to be personal estate transferable on the books of the Company. Under section 60 no transfer is valid or effectual save as exhibiting the rights of the parties thereto toward each other until entry thereof is made in the books of the Company. By-law 22 of the Company provides, further, that the shares shall be transferable only by the recording of the transfer on the stock-book of the Company at their head office or the office of their transfer agents, if any, and the Company's authorised form of certificate states that the shares are transferable only on the books of Corporation by the holder in person or his attorney upon surrender of the certificate properly endorsed. By section 118 of the statute the Company's register of shares and shareholders is required to be kept at its head office "within Ontario," and (by section 119) available for inspection. There is provision in the statute—*see*

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sections 52 and 119—for relaxation of the stringency of some relevant provisions by special Act, or letters patent, or by-laws, or leave of the Lieutenant-Governor, but no such special sanction exists in this case. By section 121 of the statute, jurisdiction is given to the Supreme Court of Ontario to order rectification of the books, and to determine questions of title in relation to the shares.

On the face of the statutory conditions above enumerated, it must be seen that if the Corporation has a local habitation Ontario is its locality. For the appellants, however, facts are relied upon such as in the case of an individual might well have warranted an argument, that the person in question had chosen as his place of domicile the State of New York and had followed up his choice by action effectual to secure domicile there.

Frank V. E. Bardol and his associates in the organisation of the Company and the conduct of its affairs appear to have been all of them people of the State of New York. Every meeting of the Company, whether of shareholders or of directors, took place in the City of Buffalo; the management of the Company's business was conducted from its office in Buffalo; its books, records and documents were kept there; the common shares actually issued were issued there, and such transfers as took place were made and recorded there.

The appellants contended that shares in a joint stock company have no local situation, that, like debts and other choses in action and rights arising *ex contractu,* they constitute property of which the value—applying the maxim *mobilia sequuntur personam*—is taxable at the place of domicile of the deceased possessor. This view was adopted by Logie, J., at the trial of the action.

A series of judicial decisions extending from *Attorney-General* v. *Higgins*[1], in the Court of Exchequer in 1857, to *Brassard* v. *Smith*[2], before this Board in 1925, have ascertained beyond possible doubt the test which must be applied to determine the local situation of the shares of a joint stock company when that fact has to be determined in order to decide as to liability to or immunity from local taxation. *Cotton* v. *Rex*[3] and *Burland* v. *Rex*[4], which were much discussed in the argument here, show the working of the rule, but do not qualify it as previously laid down.

In *Attorney-General* v. *Higgins*[1], as in *Brassard* v. *Smith*,[2] duty upon shares was in question. In *Attorney-General* v.

1. (1857) 2 H. & N. 338.
2. (1925) A.C. 371.
3. (1914) A.C. 176.
4. (1922) 1 A.C. 215.

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Higgins[1] Baron Martin held that when transfer of shares in a Company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Brassard* v. *Smith*,[2] epitomised the crucial inquiry in a sentence—"Where could the shares be effectually dealt with." The circumstances relied upon by the appellants which show the predilection of the members of the plaintiff Company for transacting its business in Buffalo; so far as they might; have, in their Lordships' opinion, no material weight. The shares in question can be effectually dealt with in Ontario only. They are, therefore, property situate in Ontario and subject to succession duty there.

The remaining question in the case is whether the liability purported to be created by section 10 (2) of the statute in question is of such a nature as to render the sub-section null as being made without authority; that is to say, as exceeding the power of the Provincial Legislature under the British North America Act, 1867, section 92, to make laws in relation to direct taxation within the Province. On behalf of the appellants it was contended that the statute in so far as it purports to create a liability in the plaintiff Company, does not in truth impose succession duty on the Company, but lays a tax upon persons not concerned in the succession in question in the expectation and with the intention that they shall indemnify themselves at the expense of those actually interested in the succession. "A direct tax," it was said on undoubted authority, "is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and the intention that he shall indemnify himself at the expense of another." The practical distinction between direct and indirect taxation formulated by John Stuart Mill in his "Political Economy" is, as was pointed out in *Attorney-General of British Columbia* v. *Canadian Pacific Railway Company*[5], "not a legal definition, " but "a fair basis for testing the character of the tax in question." The question to be answered in the present case is not much helped by considering whether the impost effected by section 10 (2) resembles more nearly stamp duties such as were held in *Attorney-General for Quebec* v. *Reed*[6], to be a form of indirect taxation, or duties on licences, which in *Bank of Toronto* v. *Lambe*,[7]

1. (1857) 2 H. & N. 338. 2. (1925) A.C. 371. 5. (1927) A.C. 934.
6. (1884) 10 A.C. 141. 7. (1887) 12 A.C. 575.

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were found to be direct taxes, or indeed by examination of various other cases to which their Lordships were referred. It is in truth this—Is the intention of section 10 (2) that when a Corporation allows property of a deceased person to be transferred without provision previously made for succession duty, the Corporation shall incur a liability beginning and ending with itself and answerable so far as legal liability goes out of its Corporate funds alone, or does the section intend that the Corporation shall pay the succession duty on behalf of the persons concerned, and by so doing become entitled to recover from such persons the amount paid?

The answer to the question so stated must be determined by the terms of the statute. Sub-section 10 (2), it will be seen, does two things. It enacts a prohibition in the words following:

> "No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, whether such deceased person was at the time of his death domiciled in Ontario or elsewhere, shall be transferred, paid or given to the person entitled thereto until the duty, if any, is paid or security given therefor."

Next it proceeds to provide that—

> "Any Corporation or person allowing such property to be so transferred, paid or given contrary to this sub-section shall be liable for such duty."

The statute makes no provision for reimbursement of the Company from any quarter, and no such provision can be implied. Breach of a statutory prohibition is *prima facie* a misdemeanour. It could no doubt be argued on the part of a person convicted of the misdemeanour of a wilful breach of the prohibition here under consideration that his guilt involved him only in the liability created by the second enactment in the sub-section, and if that question arises it will be determined. Meantime, it is sufficient to say, as is said in the judgment of the learned Chief Justice in the Court of Appeal, "The sub-section penalises a Company which permits any property of a deceased person to be transferred until the duty payable in respect thereof is paid or secured, and the Company is not entitled to recover the penalty from the beneficiary."

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The costs here and below will be borne by the appellants.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Blake & Redden.*

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice*, MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

K. P. Muhammad Kasim Rowther .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

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Muhammad Kasim Rowther *v.* The Commissioner of Income-tax, Madras.

Indian Income-tax Act (XI of 1922), Ss. 22 (4), 23 (4)—Account books of foreign business—Right to call for—Failure to produce—Onus of proving disability.

The Income-tax Officer is entitled to require the assessee to produce the books of his foreign business. Where an Income-tax Officer calls upon an assessee to produce account books which ordinarily would be in his possession and control, the assessee has got to show that he is incapable of producing them. If they would not ordinarily be in his possession and control, the *onus* would then lie on the Officer to show the assessee could produce them but has failed to do so.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

In accordance with the High Court's order quoted above I have the honour to refer the following case for the opinion of the Hon'ble the Judges of the High Court under section 66 (3).

2. The petitioner is a resident of Kondagai within the jurisdiction of the Income-tax Officer, Negapatam. He owns lands and house properties in British India and is a partner owning a 4|5th share in a firm carrying on business in cloth and rubber in Penang in the Federated Malay States.

3. The deed of partnership under which this business is carried on reserves to each partner the right of free access to the accounts and the right to inspect and copy them.

4. For the assessment of the year 1928-29 the petitioner was called on to make a return of his income in the prescribed form. He returned the form sent to him without entering any figures in it. But on the form was written in Tamil: "No interest, income or business.' The Income-tax Officer called on the petitioner by a notice under sections 22 (4) and 23 (2) to adduce evidence in support of his return and to produce certain accounts and documents. In response to this notice the petitioner's authorised agent appeared but did not produce any evidence. The Income-tax Officer had reason to believe that the petitioner had been receiving remittances from his business abroad. He, therefore, required him again by a notice issued under section 22 (4)

*O.P. No. 145 of 1929. 14th April, 1930.

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of the Income-tax Act to produce the accounts relating to the cloth business at Penang and the rubber estates at Perlis in the Federated Malay States for the years 1925-26 to 1927-28. This notice was accompanied by a covering letter, dated 3rd September, 1928, of which I enclose a copy—Exhibit A. The petitioner did not produce the accounts but stated that the business in the Federated Malay States was a partnership concern and that as the account books were the property of the partnership he was unable to produce them. As the petitioner had not produced any of the accounts specified in the notice, the Income-tax Officer held that he had failed to comply with the notice under section 22 (4) and accordingly made an assessment on the petitioner under section 23 (4) on an income of Rs. 1,00,133 as under:

		Rs.
Property	.. .. ..	133
Foreign profits received in British India	..	1,00,000
	Total ..	1,00,133

5. The petitioner applied to the Income-tax Officer under section 27 for a re-opening of the assessment but the Income-tax Officer declined to re-open the assessment as he was not satisfied that the petitioner had been prevented by sufficient cause from complying with the notice under section 22 (4). A copy of the order giving reasons for this decision is enclosed—Exhibit B.

6. The petitioner appealed to the Assistant Commissioner against the Income-tax Officer's order. Though the question before the Assistant Commissioner was merely whether the petitioner had or had not been prevented by sufficient cause from complying with the notice issued to him by the Income-tax Officer for the production of the foreign accounts, he allowed the petitioner even at that stage a further opportunity of producing evidence. He suggested that copies should be made from the day books in Penang relating to the year 1927-28, and the petitioner gave a written undertaking, dated 18th December, 1928, to do so. A copy of this is enclosed—Exhibit C. On March 5, 1929, he produced an extract of his personal ledger taken from the books of the Penang firm and along with this presented a petition, a copy of which is enclosed, Exhibit D. The extract showed that he had received Rs. 5,000 in Madras in return for a cheque drawn upon his Penang business. In the absence of fuller evidence the Assistant Commissioner was not prepared to believe that this was the only remittance. As even at this stage the petitioner had not produced either the accounts or copies of them (apart from the extract above mentioned) the Assistant Commissioner dismissed the appeal.

7. The petitioner then applied to my predecessor for a reference to the High Court on two alleged questions of law said to

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arise out of the Assistant Commissioner's order. My predecessor declined to make a reference.

8. On the petitioner's application to the High Court, the Court has now ordered me to refer the following two questions for its opinion and I accordingly refer them.

Question (1).—"Whether on the facts found in this case it is open to the Income-tax authorities to require the petitioner, who is assessed under section 23 (4), to produce all the original accounts of the firm carrying on business outside British India."

Question (2).—"Whether it is open to the authorities to require copies of the whole accounts to be produced."

9. My opinion on these questions is as follows:—

Question (1).—The provision of law empowering the Income-tax Officer to require the production of accounts is section 22 (4). The power is conferred subject to two restrictions: (*i*) that the person required to produce the accounts must be a person upon whom a notice under section 22 (2) has been served; and (*ii*) that accounts relating to a period more than 3 years prior to the previous year may not be called for. Subject to these restrictions an Income-tax Officer may require the production of any accounts. The profits of a foreign business are liable to tax if remitted—section 4 (2)—and the accounts of such a business are evidence both of the amount of the profits and of the fact of remittance. I consider, therefore, that it was open to the Income-tax Officer to call for the foreign accounts in this case.

The fact that the accounts were in this instance those of a partnership does not appear to alter the legal position. The petitioner was the dominant partner with a 4|5th share in the firm. The accounts, if not in his physical possession, were certainly under his control. He had the right to inspect and copy them. His statement that in the matter of their production he was overruled by his partner was rightly disbelieved, and even if true would not justify his failure to comply with the notice.

Question (2).—The formal ground on which assessment was made under section 23 (4) in this case was the petitioner's failure to respond to a notice calling for the original accounts. It was made clear that other evidence, such as day-book extracts or copies, if in existence, would be considered, but nothing turns on that. Petitioner was not assessed under section 23 (4) for failure to produce "copies of the whole accounts," and I submit, therefore, that this question is one which on the facts of the case does not arise. But it is clear that copies of the accounts, if in existence, are documents which can be called for under section 22 (4), which does not relate to accounts alone.

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T. V. Muthukrishna Aiyar, N. Muthuswami Aiyar and *M. Subbaroya Aiyar* for assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

The Court delivered the following

JUDGMENT.—The question referred to us by the Commissioner of Income-tax is as follows:—

"Whether on the facts found in this case it is open to the Income-tax authorities to require the petitioner, who is assessed under section 23 (4), to produce all the original accounts of the firm carrying on business outside British India."

The facts of the case are that the assessee, who resides in British India, carries on business in Penang in partnership with another who is in Penang and that in respect of the partnership the assessee is entitled to a 4|5th share and the other partner in Penang to 1|5th share. The Income-tax Officer called upon the assessee to produce all his account books, day books, ledgers, etc., of the Penang business. The assessee did not comply with the request. Before the Income-tax Officer he stated his inability to do so and he produced before him his 1|5th sharer who stated that he was unwilling that the assessee should produce the Penang account books. It is quite clear on reading the order of the Income-tax Officer and it is definitely so stated in the order of the Commissioner of Income-tax that this story was not believed by the Income-tax Officer and certainly, having regard to the fact that in this partnership he is a 4|5th sharer, it does not seem to us to be at all likely that the 1|5th sharer would have refused to produce the Penang account books if his partner had so requested. The whole story sounds a most improbable one and we think that the Commissioner of Income-tax has taken up the correct position in disbelieving the story.

The question to be considered here is, first of all, whether, when a foreign business is carried on by an assessee in British India, the Income-tax Officer is entitled to require the assessee to produce the books of his foreign business. On this point we are clearly of the opinion that the Income-tax Officer is entitled to do so.

The next point that arises is, what account books is he entitled to call upon the assessee to produce? The answer to this question obviously must be such account books as are necessary to enable the Income-tax Officer here either to check the return already made by the assessee or himself to form an

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estimate of the income of the assessee. In this case it is conceded by the assessee that the Penang books were relevant. Obviously they were because one of the things the Income-tax Officer has to consider was whether the remittances from Penang to British India came out of capital or whether they came out of profits made in the Penang business. If there were profits of an amount sufficient to enable the remittances to be made to British India, then the inference is that the remittances came out of profits. So the first thing the Income-tax Officer had to consider was whether any profits and, if so, to what amount had been made in Penang. Clearly for the purpose of deciding that question he had to have inspection of the Penang account books and by Penang account books we mean not only the ledger but also the cash and the day books.

The other question arising is whether, if the assessee does not produce the account books, the Income-tax Officer is entitled under all circumstances to make the assessment under section 23 (4) of the Indian Income-tax Act. We think that it has got to be shown that the assessee could comply with the order for the production of the account books. It clearly would not be right to say that the Income-tax Officer is entitled to call upon a person to produce account books which would not ordinarily be in the possession and control of that person. We think that the right view to take of the case is that where an Income-tax Officer calls upon an assessee to produce account books which ordinarily would be in his possession and control, then the assessee has got to show that he is incapable of producing them. Of course, if the Income-tax Officer calls upon the assessee to produce account books which would not ordinarily be in his possession and control, then the *onus* would lie upon the Income-tax Officer of showing that the assessee could produce them but has failed to do so. In this case, for the reasons we have already stated, it is quite clear that the books were under the control of the assessee, that he could have produced them and that he failed to comply with the notice issued to him to produce them. Under these circumstances the Income-tax Officer was quite entitled to make the assessment under section 23 (4) of the Indian Income-tax Act. The question referred to us is answered accordingly. The assessee will pay Rs. 250 costs to the Commissioner of Income-tax.

S. R. *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CORNISH.

Anganna Reddi and others .. *Appellants**
(Respondents 2, 4 and 5)

v.

Subbaroya Chettiar and another .. *Respondents*
(Petitioner and 1st Respondent).

Anganna Reddi *v.* Subbaroya Chettiar.

Civil Procedure Code (V of 1908), *S.* 144, *O.* 21, *R.* 53 (3), *O.* 22, *R.* 10 (2)—*Restitution proceedings—Attachment decree-holder of an original decree—Whether liable to restitution on a reversion of the original decree by the Appellate Court.*

A decree-holder attached a decree which the judgment-debtor got against another person whose appeal against that decree was pending in the High Court, and realised the decree amount. On a reversal by the Appellate Court of the original decree that was attached, the appellant sought relief by way of restitution proceedings against the attachment decree-holder.

Held, that if as representative of the original decree-holder, an attachment decree-holder is entitled to the benefits of execution provided by the Code, he must also be liable, similarly, as the original decree-holder to the burdens imposed upon such decree-holder by the Code when the decree in execution, of which proceedings were taken, is subsequently reversed on appeal.

Kedar Nath v. *Jai Berhma,* (1916) 37 I.C. 863; *Jai Berhma* v. *Kedar Nath Marwari,* (1922) L.R. 49 I.A. 351: I.L.R. 2 Pat. 10: 44 M.L.J. 735 (P.C.), *Jatindra Nath* v. *Sarat Chandra,* (1918) 29 C.L.J. 360 and *Govindappa* v. *Hanumanthappa,* (1912) I.L.R. 38 M. 36: 23 M.L.J. 513, referred.

Appeal against the order of the District Court of South Arcot, dated 30th November, 1928 and made in E.P.R. No. 5 of 1928 in O.S. No. 1 of 1924.

C. S. Venkatachariar for appellants.

K. P. Padmanabha Pillai for respondents.

The Court delivered the following

JUDGMENT.—This appeal raises a question relating to the construction of section 144 of the Civil Procedure Code. In O.S. No. 1 of 1924 on the file of the District Court of South Arcot, Periathambi Dorai obtained a decree against Subbaroya Chetty for money. Subbaroya Chetty had preferred an appeal to the High Court against that decree. Pending appeal the appellant before us, Anganna Reddi, who had obtained a decree in O.S. No. 11 of 1923 on the file of the Salem Court against Periathambi Dorai, had his decree transferred to the South Arcot Court and he attached the decree which Periathambi Dorai had obtained against Subbaroya Chetty in O.S. No. 1 of 1924. In execution of the attached decree the appellant, namely, the decree-holder in O.S. No. 11 of 1923, was able to realise a sum

*C.M.A. No. 84 of 1929. 11th March, 1930.

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of Rs. 3,000. The result of Subbaroya Chetty's appeal to the High Court against the decree in O.S. No. 1 of 1924 was that the High Court reversed the judgment of the Trial Court and remanded the suit for fresh disposal. The result of the fresh disposal by the Trial Court was that Periathambi Dorai's suit was dismissed. It is said that an appeal is pending in this Court against that decree dismissing the suit. In the meanwhile Subbaroya Chetty, the judgment-debtor in O.S. No. 1 of 1924, applied to the South Arcot Court for restitution against Anganna Reddi, the decree-holder in O.S. No. 11 of 1923, who as attaching decree-holder of the decree in O.S. No. 11 of 1923 had realised Rs. 3,000 from the defendant, Subbaroya Chetty. He alleged that the decree in O.S. No. 1 of 1924 having been ultimately reversed and as things stand at present, he is entitled to have restitution under section 144 of the Code. The plea of Anganna Reddi was that the rights if any which Subbaroya Chetty had were only against Periathambi Dorai and not against Anganna Reddi. That contention of Anganna Reddi having been overruled by the Lower Court, the Lower Court allowed execution by way of restitution to proceed against Anganna Reddi in respect of Rs. 3,000 drawn by him with interest. It is against that decision that Anganna Reddi has preferred the present miscellaneous appeal.

It was argued on behalf of the appellant by his learned Advocate that the judgment-debtor Subbaroya Chetty was not entitled to any relief as against him, and that Subbaroya Chetty's relief should be sought by proceeding against Periathambi Dorai. He argued that Anganna was not the decree-holder on O.S. No. 1 of 1924 nor an assignee of the decree-holder and consequently no restitution proceedings should be started as against him. In answer to that contention, it was urged on behalf of the respondent that section 144 read with Order 21, Rule 53 (3) and Order 22, Rule 10 and also section 146 of the Code entitled Subbaroya Chetty to relief against the appellant. Now Order 21, Rule 53 (3) indicates that

> "The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof;"

so that, this section specifically says that such attaching decree-holder shall be deemed to be the representative of the holder of the attached decree and as such entitled to execute such attached decree. Turning now to Order 22, Rule 10 which is the section prescribing the procedure to be followed in cases

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of assignment before final order in suits, clause 2 of Order 22, Rule 10 provides as follows:—

"The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."

Reading these two provisions of law together, it is, we think, reasonably clear that the attaching decree-holder in these circumstances is the representative of the original decree-holder for purposes of execution. Restitution proceedings are essentially proceedings in execution. If as representative of the original decree-holder, an attaching decree-holder is entitled to the benefit of execution provided for by the Code, he must also be liable, similarly, as the original decree-holder to the burdens imposed upon such decree-holder by the Code when the decree in execution of which proceedings were taken is subsequently reversed on appeal. Section 146 is also relevant in this connection. That section indicates that

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Subbaroya Chetty would undoubtedly be entitled to take out proceedings under section 144 against Periathambi Dorai, the original decree-holder. Under section 146, as Anganna Reddi is the representative of Periathambi Dorai for purposes of execution, Subbaroya Chetty is entitled to take similar proceedings against Anganna Reddi. It was argued that there is a difference between the attachment of a decree and an assignment of a decree. No doubt it is so. An assignment of a decree will vest in the assignee all the rights of the original decree-holder, whereas in the case of an attaching decree-holder the section only makes him the representative of the original decree-holder to the extent necessary for the purpose of satisfying his decree. It is possible that the original decree which was attached was for a sum much larger than the amount of the decree for which that decree was attached. In the case of an assignment of a decree, this Court has laid down in *Govindappa* v. *Hanumanthappa*[1] that an assignee decree-holder would be liable to be proceeded against under section 144 in case the original decree was reversed in appeal even though the assignee decree-holder was not a party to the final decree which reversed the Lower Court's decree. The learned Judges observed that it was open to the assignee decree-holder to make himself a party to the appeal, and if he trusted the original decree-holder

1. (1912) I.L.R. 38 M. 36: 23 M.L.J. 513.

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to do the needful, he could not subsequently be heard to say that he was prejudiced by not himself being a party on record in the appeal. Similarly, reading Order 21, Rule 53 with Order 22, Rule 10 it is reasonably clear that it was open to the attaching decree-holder to make himself a party to the appeal and, not having made himself a party, he cannot be heard to complain that the original decree-holder on record did not sufficiently represent him. The cases quoted by the appellant, namely, *Kedar Nath* v. *Jai Berhma* [2] and *Jai Berhma* v. *Kedar Nath Marwari*,[3] as also *Jatindra* v. *Sarat*[4] are not cases where a person standing in the position of a decree-holder took coercive steps to have the properties of the judgment-debtor brought to sale by processes in execution. These were cases where money decree-holders finding moneys belonging to their judgment-debtor in Court proceeded to get at the same under section 73 of the Code. The Courts held, that in the circumstances, they could not be said to be decree-holders or representatives of decree-holders in the sense that the judgment-debtor would be entitled to proceed against them in case the orders were subsequently reversed. On the other hand in *Raja Rao* v. *Ananthanarayanan Chetty*[5] the Officiating Chief Justice remarks as follows:—

> "The decree-holder in that case was the person responsible for wrongfully bringing the properties to sale. In the present case refund is asked for from persons who had nothing to do with causing the auction sale, but merely profited by it, in the way of rateable distribution under the orders of the Court. This distinction seems to me to be of considerable importance in connection with the exercise of extraordinary powers which are of a purely equitable and discretionary nature."

Courts, in exercising jurisdiction under section 144, do so by virtue of the equitable jurisdiction to set right the injustice caused by the Lower Courts passing erroneous decrees and by allowing proceedings to be taken thereunder. In such cases it has been pointed out that it is the duty of the Court as far as possible to restore parties to the position in which they would have been had not the erroneous orders been passed. No doubt in its anxiety to work out justice, a Court should not in the exercise of powers under section 144 work out injustice in particular cases. Having regard to the facts in the present case we are not in a position to say that the Lower Court was not entitled to pass orders directing the appellant to restore the benefit that he received by executing the decree in O.S. No. 1 of 1924.

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2. (1916) 37 I.C. 863.
3. (1922) L.R. 49 I.A. 351: I.L.R. 2 Pat. 10: 44 M.L.J. 735 (P.C.).
4. (1918) 29 C.L.J. 360.
5. (1921) 42 M.L.J. 308 at 311.

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The order passed by the Lower Court is accordingly right, and we dismiss the appeal with costs. The respondent will, however, be directed not to draw the money from the Lower Court for a period of one month from this date. The stay petition is dismissed.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Thadi Subbi Reddi .. *1st Accused*.*

Subbi Reddi, *In re.*

Criminal Procedure Code, 1898 as amended, S. 195 (1) (c)—Court—Assistant Registrar of Co-operative Societies—Offence under S. 471, Penal Code—Use of forged document prior to proceedings before Court—Complaint by that Court if necessary—Practice—Direct decision of High Court—Duty of Subordinate Court to take guidance therefrom.

The Assistant Registrar of Co-operative Societies, to whom a dispute touching a debt due to a society by a member is referred, is a Court within the meaning of S. 195, Criminal Procedure Code.

Even when the use as genuine of a forged document under S. 471, Indian Penal Code, is prior to the proceedings before the Court, the complaint of the Court before which that document was filed or used is necessary under S. 195 (1) (c) of the Code of Criminal Procedure.

Re *Parameswaran Nambudri,* (1915) I.L.R. 39 Mad. 677, followed.

When there are decisions of the Madras High Court bearing on the point involved in a case, it is the duty of a Subordinate Court to be guided by them rather than by the decisions of other High Courts.

Letter of the Assistant Sessions Judge of East Godavari at Rajahmundry, Dis. No. 91, dated 10th January, 1930, requesting that for the reasons stated, the High Court will be pleased to quash the commitment against Thadi Subbi Reddi, the 1st accused in regard to an offence under section 471, Indian Penal Code, made by the Sub-Magistrate of Kothapeta to the Sessions Court of East Godavari at Rajahmundry in his committal order, dated 19th November, 1929, in P.R.C. No. 6 of 1929 on his file.

D. Suryaprakasa Rao for 1st accused.

P. Govinda Menon for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—This is a reference under section 215 of the Code of Criminal Procedure by the Assistant Sessions Judge of East

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*Cr. M.P. No. 59 of 1930. 27th February, 1930.

Subbi Reddi, *In re.*

Godavari requesting this Court to quash the committal under section 213 to that Court of the respondent Thadi Subbi Reddi.

The respondent was the President of a Co-operative Society. Another person who was committed along with him to the Lower Court was the secretary of the same society. They and three other people were charged with having got up a bond for Rs. 750 purporting to be executed by one Karri Venkatareddi in favour of the Society, the respondent Subbi Reddi signing it as a surety. The respondent and the secretary are alleged to have, after putting this upon the record of the co-operative society, handed it over to their successors when they left the office on the 2nd of November, 1928. When the new President filed a suit on the bond before the Assistant Registrar against Karri Venkatareddi, the alleged maker, and the respondent as surety, Karri Venkatareddi brought a criminal complaint of forgery against the respondent, the secretary, and three others. The respondent and the secretary were also charged with having used the bond knowing it to be a forgery by handing it over to their successors in office. The Magistrate committed the five accused. In the Sessions Court the charge of forgery was ordered to be dealt with separately from the charge of using a forged document as genuine, because the latter charge only affected the respondent and the secretary, whereas the former affected all the five accused persons. But in the Sessions Court it was discovered that the bond having been filed before the Assistant Registrar for the purpose of the suit, the case of forgery against the respondent and of using the document as a genuine document against the respondent could not proceed for want of the necessary complaint under section 195 of the Code of Criminal Procedure. As the trial on the forgery section had begun the learned Sessions Judge discharged the respondent in that case relying upon certain decisions which show that that is the proper course when the defect is discovered after the trial has begun. But the trial under section 471 against the respondent not having actually commenced, he has reported the matter to this Court for the committal being quashed.

The two questions which arise are: (1) Whether the Assistant Registrar before whom the Co-operative Society has filed its suits or its claim for enforcing the bond is a Court within the meaning of section 195 of the Code of Criminal Procedure, and, (2) if so, whether the fact of the alleged use of the document having been before the institution of that suit, section 195 (*c*) applies to the case at all.

On the first question, clause (2) of section 195 as amended in 1923 states that in clauses (*b*) and (*c*) of sub-section (1) of the same section the term "Court" includes a Civil, Revenue or Criminal Court, etc. It has been held that the term "Court" in this section has a wider meaning than the expression "Court of Justice" in the Penal Code and includes a tribunal entitled to deal with a particular matter and authorised to receive evidence bearing thereon in order to enable it to arrive at a determination upon the question. Vide *Nanda Lal Ganguli* v. *Khetra Mohan Ghose.*[1] According to Rule 14 of the Rules made by the Local Government in pursuance of section 43 (1) of the Co-operative Societies Act, the Registrar to whom a dispute touching a debt due to a society by a member is referred has power to administer oaths, to require the attendance of all parties concerned and of witnesses and to require the production of all books and documents relating to the matter in dispute. By the same rule the Registrar is required to give a decision in writing and when it is given the decision may be enforced on application to the Civil Court having jurisdiction over the subject-matter of the decision as if it were a decree of Court. The Registrar acting under this Rule No. 14 falls clearly within the description of "Court" given in the decision cited and I, therefore, hold that the Assistant Registrar before whom the suit was filed was a Court.

On the second question, the learned Sessions Judge has referred to *In re Bhau Vyankatesh,*[2] *Khairati Ram* v. *Malawa Ram*[3] and *Kanhaiya Lal* v. *Bhagwan Das*[4] to show that, even where the use as genuine of a forged document under section 471 is prior to the proceedings before the Court, the complaint of the Court before which that document was filed or used is necessary under section 195. But there is a decision of our own Court to the same effect; and where there are decisions of this Court it is the duty of Subordinate Courts to be guided by them rather than by the decisions of other High Courts. In *In re Parameswaran Nambudri,*[5] with respect to a case which fell under section 195 (1) (*b*), it was held that "it (clause *b*) aims at doing so by providing that where, prior to the institution of the criminal prosecution, a properly constituted judicial tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the Criminal Court should

1. (1918) I.L.R. 45 C. 585.
2. (1925) I.L.R. 49 B. 608.
3. (1924) I.L.R. 5 Lah. 550.
4. (1925) I.L.R. 48 A. 60.
5. (1915) I.L.R. 39 M. 677.

Subbi Reddi, *In re.*

decline cognizance unless that tribunal has, in effect, certified that in its opinion the complaint is one worthy of investigation." Cases under section 195 (1) (*c*) are as regards this matter on exactly the same footing as those which fall under clause (*b*). If anything, the matter has been put beyond controversy by the wording of clause (*c*) as amended which is "when such offence is alleged to have been committed by a party to any proceeding in any Court," etc. The word "alleged" shows that the use complained of may be before the proceedings in Court commenced. It follows that a complaint by the Assistant Registrar was in this case necessary before any Court could take cognizance of the charge under section 471 against the respondent. The whole of the proceedings, therefore, before the Magistrate were incompetent and the commitment by him must, therefore, be and hereby is quashed.

B.V.V. *Commitment quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CORNISH.

Nagalinga Chettiar .. *Petitioner** (*Petitioner*)

v.

Guruswami Aiyar and others .. *Respondents* (*Respondents Nos. 2, 3 and 6*).

Nagalinga Chettiar *v* Guruswami Aiyar.

Civil Procedure Code (V of 1908), O. 21, R. 93—Court-sale of two properties in single lot—Title of judgment-debtor to one item subsequently found against—Application by purchaser for proportionate refund of price paid—Maintainability.

O. 21, R. 93, Civil Procedure Code, is applicable only to cases of entire absence of any interest in the judgment-debtor in respect of the property sold and not to cases where the judgment-debtor has some interest in the property, however small that may be.

Where an auction-purchaser purchased two items of properties which were sold in one lot, and it was subsequently found that the judgment-debtor had no title to one of the items included in the lot,

Held, that the auction-purchaser was not entitled to apply for a proportionate refund of the price paid by him.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Negapatam in C.M.A. No. 2 of 1925 (C.M.A.

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*C.R.P. No. 253 of 1926. 17th March, 1930.

No. 94 of 1924, District Court, Negapatam) preferred against the order of the Court of the District Munsif of Mayavaram in E.A. No. 50 of 1924 in S.C.S. No. 610 of 1920 on the file of the Court of the Subordinate Judge of Mayavaram.

Nagalinga Chettiar v. Guruswami Aiyar.

T. V. Muthukrishna Aiyar for petitioner.

K. S. Sankara Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT.—The applicant before us was the purchaser in Court auction of some immoveable properties sold in execution of a money decree. He purchased in one lot two items of properties. In the sale proclamation it was mentioned that there was already a partition in the family of the judgment-debtor. In execution of the sale certificate the auction-purchaser was put into possession of both the items of properties included in the lot. Subsequently at the instance of the other defendants in the case, who were exonerated from liability under the decree, one of the items was found not to be the property of the judgment-debtor but to be the property of the other defendants. The Court accordingly directed that the auction-purchaser should deliver back to defendants 3 and 4 that item of property which was found to be their property. The auction purchaser filed, under Order 21, Rule 93, Civil Procedure Code, an application in the District Munsif's Court praying that he may be allowed a proportionate refund of the price paid by him. Both the Lower Courts have dismissed his application, and he has preferred the present petition.

The present is a case where the auction-purchaser purchased certain properties which were sold in one lot. It is found that the judgment-debtor had title to some of the properties included in the lot. It is also found that the judgment-debtor had no title in respect of some of the properties included in the lot. In these circumstances, the question was argued whether the auction-purchaser is entitled either to have the sale set aside or to have a refund of proportionate amount of the purchase-money paid by him into Court. The prayer of the auction-purchaser in the application that he filed before the District Munsif was to have a proportionate refund of the price paid by him. We are of opinion that he is not entitled to such relief. It is settled law that in Court sales there is no warranty of title in respect of the properties sold. It is only the right, title and interest of the judgment-debtor in the properties included in the lot that pass to the auction-purchaser. Order 21,

Nagalinga Chettiar v. Guruswami Asyar.

Rule 93 would not apply to cases where a judgment-debtor has some interest in the property, however small the same may be. It would apply only to cases of entire absence of any interest in the judgment-debtor in respect of the properties sold. That position, we take it, is clearly established. Having regard to the facts of the present case, namely, that the auction-purchaser does not complain of want of title in respect of some of the properties included in the lot—in fact he is in undisputed possession of some of the properties purchased by him—we think that the application for proportionate refund is unsustainable. In this view we confirm the orders of the Lower Courts and dismiss the revision petition with costs.

B.V.V. *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRIAR AND MR. JUSTICE PAKENHAM WALSH.

Maila Rai .. *Appellant* (Repdt.)*

v.

Derappa and others .. *Respondents (Applts.).*

Mortgage by conditional sale—Executed prior to 1858*—Term for redemption extending later—Law governing.*

Maila Rai v. Derappa.

A deed of usufructuary mortgage, executed in 1844 and containing a condition for defeasance if not redeemed within 30 years, is governed by the ruling in *Thumbusawmy's case,* (1875) L.R. 2 I.A. 241: I.L.R. 1 M. 1 (P.C.). The principle of giving effect to the intention of the parties evidenced by the contract is applicable to all mortgages alike, executed prior to 1858.

Pattabhiramier v. *Vencatarow,* (1870) 13 M.I.A. 560; *Bapirazu* v. *Kamarazu,* (1881) I.L.R. 3 M. 26 and *Ramasami* v. *Samiyappanaykan,* (1881) I.L.R. 4 M. 179 (F.B.) referred to.

The fact that the term fixed for redemption went later than 1858 is immaterial.

Kanthu v. *Dasa Upadhya,* (1914) 26 I.C. 376, referred to.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Phillips, dated 27th July, 1925, in S.A. No. 1788 of 1922, preferred to the High Court against the decree of the Court of the Subordinate Judge of South Kanara in A.S. No. 263 of 1921 (A.S. No. 369 of 1921, District Court) preferred against the decree of the Court of the District Munsif of Puttur in O.S. No. 128 of 1920.

The Advocate-General (A. Krishnaswami Aiyar) for appellant.

T. Rangachariar for *K. Y. Adiga* for respondents.

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*L.P.A. No. 26 of 1926. 24th October, 1929.

Maila Rai
v.
Derappa.

The Court delivered the following

JUDGMENT.—This is an appeal against the decision of Phillips, J., reversing the decree of both the Lower Courts and dismissing the suit to redeem.

The facts are shortly these. A deed of mortgage executed in 1844 was sought to be redeemed. The deed which is said to be a usufructuary mortgage deed, dated the 11th of December, 1844, begins by stating that the mortgagor on account of his necessity usufructuarily mortgaged to the mortgagee for 248 varahas the property described in the document. The material portion is as follows:—

"Thus in total I received from you 248 varahas as detailed above and delivered this day to your possession the entire land, bagayat house, cow-pen and also out-house bearing the said beriz and I have also given to you one decision obtained by me in respect of the said land and also one yadast executed by Shama Rao, Amin of Uppinangadi Taluk Munsiff's Court, for having delivered the said land to me. In future you alone shall pay the *sirkar tirva* to Government and enjoy the said land, bagayat house, cow-pen and out-house lying within the boundaries mentioned in the decision. You shall have no reason to claim interest for the amount and I shall have no reason to claim any profits out of the said land. I shall pay the consideration amount of 248 varahas to you in one lump sum after a period of twenty-five years and within a period of thirty years from this day and get back from you the said land, bagayat house, cow-pen and out-house, and also the two documents, *viz.*, decision and yadast given to you. If I fail to pay the amount and get back the land, etc., within the period mentioned above, you shall get the warg of the said land entered in your name, plant therein trees, etc., effect improvements therein and shall enjoy the same from generation to generation. I and my descendants shall have no interest therein. To this effect is the usufructuary mortgage deed of land executed out of my free will."

The word in the original is "Moulya" or price. This mortgage was not redeemed within the period specified and a suit was filed in 1920 for redemption. Phillips, J., held that the case came within the ruling *Thumbusawmy Moodelly* v. *Hossain Rowthen*[1], which was followed in *Bapirazu* v. *Kamarazu*[2] and *Ramasami Sastrigal* v. *Samiyappanaykan*.[3] The learned Judge observes:

"It seems to be immaterial whether the document purports to be a sale with a condition of re-sale or whether it purports to be a mortgage with a condition that on failure to pay the mortgage money the property shall pass to the mortgagee. If the document was executed prior to 1858 when first the above principle of law began to be modified, effect must be given to the intention of the parties."

As regards the second contention that the terms of the document should have been completed before 1858, the learned

1. (1875) L.R. 2 I.A. 241: I.L.R. 1 M. 1 (P.C.).
2. (1881) I.L.R. 3 M. 26. 3. (1881) I.L.R. 4 M. 179 (F.B.).

Maila Rai v. Derappa.

Judge following *Kanthu* v. *Dasa Upadhya*[4] held that that made no difference as regards the construction of the terms.

It is argued before us by the learned Advocate-General that the principle of giving effect to the intention of the parties evidenced by the contract in cases like the present should be confined to cases of mortgage by conditional sale, pure and simple, and as regards other mortgages this principle has no application. It is also contended that in cases where the period fixed in the deed would carry us later than 1858 the principle in *Thumbusawmy Moodelly* v. *Hossain Rowthen*[1] should not be applied and the ordinary rule as regards redemption must be applied. As regards the first point, we do not see any reason for confining the principle to mortgages by conditional sale, pure and simple, which have been defined later on by the section 56 of the Transfer of Property Act. The Advocate-General's contention is, that, unless the document is ostensibly a sale coupled with a condition for defeasance you ought not to apply the ruling in *Thumbusawmy Moodelly* v. *Hossain Rowthen*.[1] So far as we can see, the decision in *Pattabhiramier* v. *Vencatarow Naicken*[5] was on a document which was not worded as a sale with a condition for defeasance. On the contrary it begins like a mortgage and contains a clause converting the mortgage into a sale if not redeemed. The document is set out at p. 561. The report is as follows:—

"A mortgage bond had been executed by the original parties, stipulating that the mortgagee should enjoy the lands in lieu of interest, and that if the principal should be paid 'in the season of harvest of any year,' the mortgagee should receive it and give up the lands, of which possession was then given to the mortgagee; and it was also alleged that this mortgage debt had been liquidated from the usufruct of the lands."

That was not a case of a document which began with sale and ended with power to redeem. Similarly in *Thumbusawmy Moodelly* v. *Hossain Rowthen*[1] also we find that the document begins as a mortgage, refers to the principal payments by instalments and enjoyment and then winds up by saying:

"If, by the 30th of Panguni of the said Pramadhi, the money be not paid up in full, and balance still remain due, you yourself shall take hold and enjoy such of the lands (herein) as you may like and as may be equivalent to the balance due . . . . . . as if under the terms of a deed of absolute sale."

We can find very little in *Pattabhiramier* v. *Vencatarow Naicken*[5] or *Thumbusawmy Moodelly* v. *Hossain Rowthen*[1] to

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1. (1875) L.R. 2 I.A. 241: I.L.R. 1 M. 1 (P.C.).
4. (1914) 26 I.C. 376.
5. (1870) 13 M.I.A. 560.

hold that the Privy Council confined their observations to cases where the document was in the form of a sale with a condition for redemption. If their Lordships of the Privy Council as contended for by the appellants' advocate decided that the rule as to giving effect to the intention of the parties applied only in cases of mortgage where there was a sale with a covenant to reconvey on the mortgage money being paid, they would have stated the rule especially as the mortgage before them was not such a document. Their judgment applies equally to mortgages with only a clause for reconveyance. In *Bapirazu* v. *Kamarazu*[2] it was decided that as regards mortgages executed before 1858 the intention of the parties to the instrument must be given effect to. The Full Bench decision in *Ramasami Sastrigal* v. *Samiyappanaykan*[3] deals fully with the various kinds of mortgages and it is clear from the judgment of Sir Charles Turner, C.J., that he considered the question as regards the applicability of the ruling in *Pattabhiramier* v. *Vencatarow Naicken*[5] to cases where the document is in the usual form of usufructuary mortgage containing a condition that it should become an absolute sale in a particular event. At page 183 the learned Chief Justice observes:

"The various forms of mortgage known to the Hindu Law are mentioned in Colebrooke's Digest, Edition of 1801, Vol. I, pp. 81, 82."

Among these is the mortgage with a condition that, in the event of default being made in the payment of principal on or before a date named, the property mortgaged shall pass to the mortgagee as an absolute purchaser.

He then refers to various forms of mortgage. According to him, the decision in *Pattabhiramier* v. *Vencatarow Naicken*[5] would apply to mortgages prior to 1858. Under these circumstances we think there is no reason to confine the application of the rule to documents which are in form mortgages by conditional sale. The test in these cases is what was the intention of the parties? We must presume that in the case of a mortgage prior to 1858 the intention of the parties according to the terms of the contract should be enforced and the Court should give effect to the intention. The second contention is that as the terms of sale became absolute and the property became absolute property of the mortgagee subsequent to 1858, the ordinary principle of redemption should be applied. Reliance is placed upon a decision of Muthuswami Aiyar and Parker, JJ., in S.A. No. 122 of 1889. In that case the mortgage was exe-

2. (1881) I.L.R. 3 M. 26. 3. (1881) I.L.R. 4 M. 179 (F.B.).
5. (1870) 13 M.I.A. 560.

Maila Rai v. Derappa.

cuted in 1857 and their Lordships thought that there was no reason to apply the strict ruling of the Privy Council. The question, however, has been considered in a later case in *Kanthu* v. *Dasa Upadhya*.[4] The point directly arose for determination in that case and the learned Judges, Ayling and Sadasiva Aiyar, JJ., had to consider whether the fact that the term in the document went later than 1858 affected the question. The learned Judges observed:

"The respondent's learned Vakil, Mr. Yegnanarayana Adiga, tried to take away the transaction under Exhibit XXII out of the class of transactions to which the ruling in *Pattabhiramier's case*[5] applied by an ingenious comment on two sentences which occur in the later case in *Thumbusawmy Moodelly* v. *Hossain Rowthen*.[1] Those two sentences in the judgment are:—'On a stale claim to redeem a mortgage and dispossess a mortgagee who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course.' (That is the course of treating the sale as having been absolute.) 'In the case of a security, executed since 1858, there would be strong reasons for recognising and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted.' It was argued that the first sentence favours only those deeds under which the alienees had acquired absolute titles before 1858 and not a deed like the present, under which the absolute title was acquired only in 1859, though the deed itself was executed before 1858. Having regard to the observations in *Pattabhiramier's case*[5] and the whole tenor of the observations in *Thumbusawmy Moodelly* v. *Hossain Rowthen*[1] (including the second sentence quoted above), we have no doubt that their Lordships of the Privy Council favoured the natural construction of all documents *executed before* 1858, whether the title had become absolute before 1858 or became absolute only after 1858, provided the suit to redeem was brought after the title had become absolute."

It seems to us, with all deference, that the decision in *Kanthu* v. *Dasa Upadhya*[4] ought to be followed and we have to give effect to the intention of the parties at the date of the transaction. That intention is evidenced by the condition in the document which says:

"If I fail to pay the amount and get back the land, etc., within the period mentioned above, you shall get the warg of the said land entered in your name . . . . . and shall enjoy the same from generation to generation. I and my descendants shall have no interest therein."

If the terms of the deed were to be enforced, the rights must depend on what was agreed to when the mortgage was executed and not on any change in the law at the date when the money was payable.

We agree with the decision of the learned Judge on both the points and dismiss the Letters Patent Appeal with costs.

S.R. *Appeal dismissed.*

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1. (1875) L.R. 2 I.A. 241: I.L.R. 1 M. 1 (P.C.).
4. (1914) 26 I.C. 376.
5. (1870) 13 M.I.A. 560.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice*, AND MR. JUSTICE KRISHNAN PANDALAI.

Shroff Veerappa and another .. *Petitioners**
(*Accused in Cr. R. C. No.* 336 *of* 1929)

and

Nawab Shiya-ul-Mulk and another .. *Petitioners*
(*Accused in Cr. R. C. No.* 337 *of* 1929).

Veerappa *In re.*

Madras Local Boards Act (*XIV of* 1920), *Ss.* 166 (1), 207—*Bus picking up passengers outside District Board area at separate fares and running on District Board road—Penalty—Liability to—Plying for hire and using the road—Distinction.*

The first part of section 166 is intended to make persons who ply a motor vehicle for hire, in the sense of soliciting custom, within the limits of the District Board pay for it by taking out a licence and the latter part of it is intended to make persons who pick up passengers at separate fares outside the area of the District Board and who carry those passengers over a road of the District Board also take out a licence.

Local Fund Overseer, Mayavaram v. *Pakkirisami Thevan,* (1927) I.L.R. 51 Mad. 527: 55 M.L.J. 213, referred to.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of Session of the Kurnool Division in Criminal Revision Petitions Nos. 1 and 2, dated 25th March, 1929, preferred against the orders of the Stationary Sub-Magistrate of Kurnool in Calendar Cases Nos. 440 and 441 of 1928.

L. S. Veeraraghava Aiyar for petitioners in both cases.

The Public Prosecutor (*L. H. Bewes*) for the Crown in both cases.

The Court delivered the following

JUDGMENT.—The Assistant Engineer, Kurnool, under the authority of the President, District Board, Kurnool, filed a complaint against the owner and driver, respectively, of Bus No. K.U. 62, alleging that they had committed an offence by using that bus on the 15th October, 1928, for carrying passengers at separate fares on the Chittoor-Kurnool road without the District Board's licence, an offence coming within the purview of section 166 (1) of the Madras Local Boards Act of 1920 and punishable under section 207 of that Act. The complaint was presented to the Stationary Sub-Magistrate, Kurnool.

*Cr. R.C. Nos. 336 and 337 of 1929. 17th October, 1929.

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In re.

He recorded the complainant's sworn statement, and holding that the act complained of was not "plying a bus for hire" and that the contracts with the passengers had been entered into within the limits of the Kurnool Municipality and not within the limits of the jurisdiction of the District Board, decided that, upon the allegations made, there had been no contravention of section 166 (1) of the Local Boards Act. He, therefore, dismissed the complaint. A petition for revision was presented to the Sessions Court, Kurnool Division, by the complainant against the order, and the Sessions Judge set aside the order of the Sub-Magistrate and directed the District Magistrate to take the complaint on the file and make such further enquiry into it as was necessary under the law. Against that order the petitioners have presented this Criminal Revision Petition.

According to the sworn statement of the Local Fund Assistant Engineer, on the date in question, the bus was carrying passengers at "separate fares" from Kurnool to Nandyal, and the owner of the bus had not obtained the licence from the District Board required by section 166 (1) of the Madras Local Boards Act. The facts seem to be that the passengers were picked up within the municipal limits of Kurnool and carried in the bus to Nandyal, going over, in the course of the journey, one of the roads belonging to the District Board of Kurnool. For the purposes of the argument before us and in the Court below, it was not suggested that any passengers were picked up by the petitioners at any place within the limits of the District Board.

The short point for consideration by us is whether this motor bus under the circumstances must obtain a licence from the District Board of Kurnool. Section 166 (1) of the Madras Local Boards Act is as follows:—

"No person shall, on any public road in a district, ply any motor vehicle for hire, or use any such vehicle for carrying passengers or goods at separate fares or rates on such road, except on a licence obtained from the President of the District Board."

The Stationary Sub-Magistrate held that the second part of clause (1) of section 166, namely, "use any such vehicle for carrying passengers or goods" must have the same interpretation placed upon it as that applicable to the first part, namely, "plying for hire" and that, as there had been no plying for hire within the limits of the District Board's area, no licence was necessary and no offence had been committed. Before the learned Sessions Judge, the petitioners relied on a decision

reported in *Local Fund Overseer, Mayavaram* v. *Pakkirisami Thevan.*[1] In that case Madhavan Nair and Curgenven, JJ., held that a person, who lets out his car for hire within a Municipality, need not obtain a licence from a District Board, if the car travels beyond the municipal limits and traverses any of the District Board roads, and that the "plying of a motor vehicle for hire" means the act of waiting for or soliciting custom, and, therefore, so soon as any person has hired it, the act of plying for hire is complete, and that it cannot be said that a vehicle plies for hire on a public road merely because it is made use of as a hired vehicle on that road, and that a vehicle cannot be said to ply for hire on a road unless the actual hiring takes place on that road. The facts are set out on page 529 as follows:—

"The case was tried as a summons case and he was asked to show cause why he should not be convicted upon a complaint that he had plied his motor car for hire from Mayavaram to Tranquebar on the 27th, 28th and 29th March, 1925, without obtaining a licence. Although, however, the terms of the complaint were not supported by the prosecution evidence, a defence witness was examined who deposed that the accused was in the habit of letting out his car for hire to vakils, mirasidars and others wishing to engage a car for a trip from Mayavaram. It may be taken, therefore, that the accused in this case admitted hiring out his car for journeys from Mayavaram. In the other case (Calendar Case No. 200) the question put to the accused was in similar terms and the evidence was in consonance with it. In both the cases, only the first portion of section 166 (1) would apply, because, admittedly, there is no proof that the vehicles were used for carrying passengers or goods at separate fares or rates."

The statement of the facts, in our view, makes this case clearly distinguishable from that, because, according to the sworn statement of the Local Fund Assistant Engineer, the passengers in this case were carried at separate fares, whereas in *Local Fund Overseer, Mayavaram* v. *Pakkirisami Thevan*[1] the whole bus had been engaged for the trip from Mayavaram. Therefore, the only thing that that Bench had to consider was the first part of section 166 (1) and not the latter part of it; and the argument on behalf of the Board in that case was that a vehicle plies for hire on a public road if it is made use of as a hired vehicle on that road, so that it is not a necessary condition that the actual hiring should take place upon that road. That argument, however, did not find favour with that Bench, and we think quite rightly. We are in entire agreement with the decision in that case. But here the facts are different. Before us on behalf of the petitioners, it is argued that the latter words of clause (1) of the section, namely, "use of any

1. (1927) I.L.R. 51 M. 527: 55 M.L.J. 213.

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such vehicle for carrying passengers at separate fares" on a District Board road mean plying for hire on a District Board road. If this is so, then the latter part of the clause is redundant. We cannot accept that argument. We think that that section is intended to make persons, who use the road of a District Board for making money by using motor vehicles upon it pay for that privilege. The first part is intended to make persons who ply a motor vehicle for hire within the limits of the District Board pay for it by taking out a licence, and the latter part of it is, in our view, intended to make persons who pick up passengers at separate fares outside the area of the District Board, and who carry those passengers over a road of the District Board also take out a licence. What is meant by "separate fares" is individual fares as distinguished from a fixed amount for the whole vehicle, and it was, as we read the facts in *Local Fund Overseer, Mayavaram* v. *Pakkirisami Thevan's* case[1], the latter case that was there being considered.

We were referred to several English cases, but except where the definitions are given of what is "plying for hire" they do not assist us, because we are here dealing with the words of a section, which, in our view, clearly express the intention of the Legislature.

Under these circumstances, we are satisfied that the order of the learned Sessions Judge was quite proper and we agree with the reasons he has given for that order. This Criminal Revision Case is, therefore, dismissed. For the reasons given above, Criminal Revision Case No. 337 of 1929 is also dismissed.

S.R. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE AND SIR CHARLES SARGANT.

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The Trustees Corporation (India), Ltd. *v.* The Commissioner of Income-tax, Bombay Presidency.

The Trustees Corporation (India), Limited .. *Appellants**

v.

The Commissioner of Income-tax, Bombay Presidency .. *Respondent.*

Indian Income-tax Act (XI of 1922), S. 66—Reference to High Court—Finding of fact by Commissioner—Loss on sale and purchase of shares—Issue of shares at discount—Adequacy of consideration for issue of fully-paid shares—Company not a debtor to capital.

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*P.C. Appeal No. 36 of 1929. 30th January, 1930.

1. (1927) I.L.R. 51 M. 527: 55 M.L.J. 213.

Although shares cannot be issued at a discount, they may be lawfully issued as fully paid up for consideration which the Company has agreed to accept as representing in money's worth the nominal value of the shares. But if the consideration is colourable or illusory, or if the agreement for the issue of fully paid shares makes it manifest *on its face* that the actual consideration received by the Company is definitely less than the amount credited as paid up, or if an arrangement for the issue of shares is such that in the course of its due working out there is as much as a possibility that in the result the shares will have been issued at a discount, then the issue of the shares as fully paid cannot be justified.

In re *Wragg, Ltd.,* (1897) 1 Ch. 796, discussed.

Judgment of the Court of Appeal in *Mosley* v. *Koffyfontein Mines, Limited,* (1904) 2 Ch. 108 at 118, approved.

In re *Almada and Tirito Company,* (1888) 38 Ch.D. 415, *Ooregum Gold Mining Company* v. *Roper,* (1892) A.C. 125 and In re *Eddystone Marine Insurance Company,* (1893) 3 Ch. 9, referred to.

It is well settled that a Company is in no sense debtor to capital. By issuing a share credited with a definite sum as paid thereon, the Company does not become a debtor to its shareholder for any sum at all. The amount so credited upon the share may, as between one shareholder and another, while the Company is a going concern, determine the proportion of profits receivable by him as dividend, and, in a winding up, his proportion of surplus assets; but it has no influence to extend or increase the aggregate amount available for division in due course of administration amongst the whole body of shareholders.

Lee v. *Neuchatel Asphalte Company,* (1889) 41 Ch. D. 1, and *Verner* v. *General and Commercial Investment Trust,* (1894) 2 Ch. 239, relied on.

Upon a reference to the High Court made by the Commissioner of Income-tax under section 66 of the Indian Income-tax Act, 1922, on the question whether there was a loss arising out of a transaction in shares, which could be taken into account in arriving at the amount of the income for the purpose of assessment to super-tax, the conclusion of the Commissioner, if supported by evidence, that there was no such loss, is a finding of fact and binding upon the High Court.

Before entertaining any question under section 66 of the Indian Income-tax Act, 1922, the High Court should insist that the preliminary requirements of the section are strictly complied with.

Appeal No. 36 of 1929 from a judgment of the High Court, Bombay (Marten, C.J. and Kemp, J.), dated the 5th March, 1928, upon a reference of questions of law made to the High Court by the Commissioner of Income-tax, Bombay, at the instance of the appellants under section 66 (2) of the Indian Income-tax Act, 1922, whereby the main question of law raised by the reference was determined by the Court in favour of the respondent.

The material facts of the case, together with the three questions submitted by the Commissioner to the High Court, are sufficiently fully set out in their Lordships' judgment.

Marten, C.J., held (Question 2) that if in fact the Company had incurred a loss on the transaction it would be a trading or revenue

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loss which could properly be brought into the profit and loss account. He then quoted Question 1, which he said "must be answered in the negative on the facts of this particular case". After weighing all the considerations, he thought (on the authority of In re *Wragg Ltd.*[1]) that the difference between the nominal value given and the market value of the shares purchased was sufficiently great to entitle the Commissioner to challenge the adequacy of the consideration given by the English Companies. On his finding it was unnecessary to decide Question 3 and no decision on that question was, therefore, given.

Mr. Justice Kemp, in a concurring judgment, answered the first question in the negative. He agreed with the answer given by the learned Chief Justice to Question 2 and saw no necessity to reply to Question 3.

Against the judgment of the High Court the present appeal was preferred to His Majesty in Council.

A. M. Latter, K.C. and *Cecil W. Turner* for appellants.

A. M. Dunne, K.C. and *Reginald Hills* for respondent.

30th January, 1930. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—This is an appeal from a judgment of the High Court of Judicature at Bombay, upon a reference made to that Court by the Commissioners of Income-tax under section 66 (2) of the Indian Income-tax Act, 1922. The substantial question for decision by the Board is whether the appellants are liable to pay Indian super-tax for the year 1924-1925 on the footing that at the least they made no loss by, so that they are entitled to no credit in respect of, the realisation of a certain block of shares in the Burma Corporation (India), Limited, sold in January, 1924, in the circumstances now to be stated. The High Court have held them to be so liable. Hence this appeal.

The appellants, who will be referred to as the Indian Company, were incorporated under the Indian Companies' Act on the 10th February, 1920, with a nominal capital of seven crores of rupees, divided into 350,000 shares of 200 rupees each. Promoted as a private Company by two English Companies, the Share Guarantee Trust, Limited, and the Intercontinental Trust (1913), Limited, all the issued shares of the Indian Company, with the exception of one share taken by each of the two nominee subscribers to its Memorandum of Association, have throughout been held by one or other of the English Companies. Their joint control of the Indian

1. (1897) 1 Ch. 796.

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Company has thus been in every respect and at all relevant times complete.

That Company was really established that it might acquire from the English Companies, as a single block of 312,817 shares, two separate holdings in the Burma Corporation, Limited, of 134,705 shares belonging to the Share Guarantee Trust, and of 178,112 shares belonging to the Intercontinental Trust. The nominal value of each of these Burma Corporation shares was £1. They were all fully paid, and they stood in the London market at the high price of £14 each.

The terms of their acquisition by the Indian Company were contained in two sets of agreements. To one set, one of the English Companies was party disponing: to the other set, the other. But the agreements of each set were of even date, and their terms were, *mutatis mutandis*, identical. Moreover, since their execution, the respective outstanding interests in the shares of the two disponing Companies have been dealt with as if theirs was the interest of a single person in the entire block. Accuracy, in the circumstances, will accordingly not be seriously endangered, while brevity and convenience of statement will alike be served if their Lordships in what follows proceed, unless otherwise stated, upon the assumption that the entire arrangement was embodied in a series of composite agreements made between the two English Companies on the one side and the Indian Company on the other.

It was by two such agreements executed on the 10th February, 1920—the day of its incorporation—that the Indian Company's interest in the shares originated.

The first of these two agreements resulted in a simple contract for the purchase by the Indian Company of the whole block of the Burma Corporation shares in consideration of the issue of an equal number of shares in the Indian Company credited as fully paid; and, as some form of reconstruction of the Burma Corporation was apparently then in prospect under which each share in the Corporation would in due course be exchanged for 14 shares in Burma Corporation (India), Limited, the agreement contained a provision that if this exchange took place, prior to completion, the sale and purchase should apply to the shares so exchanged. The effect so far was that the Indian Company acquired 312,817 of Burma Corporation shares of £1 each, or their equivalent, in consideration of the issue of 312,817 of its own shares credited as fully paid. And the two separate agreements embodying that result were duly filed.

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But the real transaction was contained in the second of the two composite agreements already referred to, the terms of which were not intended to be filed, and were not filed.

By this second agreement, subsequently referred to between the parties and here as the principal agreement, out of the 312,817 shares of the Indian Company representing the then consideration for the Burma shares, one-half—or 156,408 shares—were to or by direction of the respective English Companies to be allotted immediately, while the remaining shares were to be allotted at the rate of one share for each two shares of the Burma Corporation as delivered to the Indian Company. Somewhat inconsistently 25,000 shares in the Burma Corporation were to be delivered to the Indian Company forthwith, while delivery of the "undelivered shares," as prescribed, was to be made on such dates as might be mutually agreed. The whole were, however, to be delivered within three years—that is, before the 10th February, 1923. In the meantime possession of the undelivered shares was to be retained by the English Companies, and during the period prior to completion these Companies were given power from time to time to deposit and charge the shares for their own liabilities joint or several or for their liabilities jointly with any other parties—up to a limit of two and one-half million pounds sterling. The English Companies were also, by a clause numbered 4, given power with the consent of the Indian Company to sell any of the undelivered shares and either to utilize the proceeds of sale in discharge of such liabilities, in which event—and this, as will later appear, was a significant provision—the purchase consideration was to be "proportionately reduced''—or to remit the proceeds to the Indian Company, in which event "the equivalent purchase consideration for the shares"—another significant provision—was to be duly allotted.

The 156,408 shares of the Indian Company credited as fully paid were duly issued by that Company as provided by the principal agreement. It would not have been easy to harmonize with the other provisions as to allotment the immediate delivery to the Indian Company of the 25,000 Burma Corporation shares. But this difficulty was not allowed to arise for neither these shares nor, indeed, any Burma shares at all were ever delivered to the Indian Company. On the 10th February, 1923, the day of expiration of the period limited for completion, all that had happened was that three years before 156,408 shares of the Indian Company had been issued as fully paid, and, so far, for nothing.

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With these circumstances unchanged a further composite agreement was, on the 14th November, 1923, come to by the parties, supplemental to and by way of variation of the original arrangement. By this time the 312,817 shares of the Burma Corporation, Limited, had become 4,379,438 shares of the Burma Corporation (India), Limited, of Rs. 10 each; and by the arrangement as now modified it was provided that these shares need not any of them be delivered before the 10th February, 1926; that the English Companies, with the general or special authority of the Indian Company might sell any of the shares and should in that event on completion pay to the Indian Company the proceeds of sale, together with all dividends received on the shares and clause 4 of the principal agreement above referred to was modified accordingly. In consideration for this, it was agreed by the English Companies—and this was a modification of the first importance—that the purchase consideration mentioned in the principal agreement should not in any case exceed the 156,408 shares already allotted as above stated.

In a case like the present where the Indian Company was throughout merely another name for the English Companies acting in concert, it would perhaps have been remarkable if these agreements, elastic as are their terms, had not been worked out so as best to meet the convenience of the two English Companies. And so they plainly were. The shares sold remained in the respective names of the two companies, who between them received and retained all the dividends; when the shares were sold they received and retained the entire purchase price: it was only after their sale, actually effected in 1924, that these receipts were even brought into the accounts of the Indian Company; and even this seems to have been little more than a book entry, for, as appears from the evidence of Mr. Sandeman, a director of that Company, no part either of the purchase price or of the dividends had even then been received in India. They remained in England, presumably under the control of the English Companies, and as late as December, 1926, they were, according to his statement, still there.

But this course of dealing, independent as it was of the Indian Company, really involved little more than a generous interpretation in the English Companies' own interests of the actual provisions of the agreements themselves which, properly understood, embodied an arrangement of a most unusual description in no way characteristic of the simple transaction of purchase and sale set forth in the filed agreements.

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The agreements left the English Companies with, in effect, the same dominion over the shares as they enjoyed before their so-called sale. With the consent of the Indian Company, which was the merest formality, the English Companies might sell the shares: without even that form of consent, they might pledge them for their own debts or for the debts of themselves or other parties for a sum or sums up to as much as 2½ million pounds. Had the English Companies pledged the shares up to that limit, and had their value fallen below it—and their value did fall far below it by the beginning of 1924, if not before—it would have been open to the English Companies within the terms of their agreements to withdraw the shares from the Indian Company altogether and retain, for nothing, their 156,408 fully paid shares in that Company. Further, if they sold any of the shares, at whatever price, on tendering that price, however small, they were entitled to one fully paid share of the Indian Company for every 28-rupee shares sold, whatever the discount involved. Finally—and this was the event which happened—on a sale of the shares under the 1923 agreements and on their accounting for the proceeds, the English Companies were entitled to retain the whole of their 156,408 issued shares irrespective of the excess of their par value over the only sum received by the Indian Company in respect of them. As a matter of fact the deficiency below par value on the realisation in 1924 amounted to as much as Rs. 50,04,972, representing a discount of approximately Rs. 32 on each of the 156,408 shares of the Indian Company.

In truth the agreements did not in any real sense embody a purchase of the Burma Corporation shares by the Indian Company, in consideration of the issue of fully paid shares of that Company. More truly the so-called purchase was an elaborate arrangement under which while, it is true, the Indian Company might in certain events have received delivery of the Burma Corporation shares in specie, it was just as likely that the Indian Company, getting everything to which under the agreements it was entitled would receive a sum of money only, a sum which it was under the arrangement bound to accept in satisfaction whatever its amount might be. And, if their Lordships may here conveniently so far anticipate, the Indian Company has in the events received, and has duly received money only for its shares so issued as fully paid. And not only so, but it has received a sum, less than the nominal value of the shares by the above figure of Rs. 50,04,972, or Rs. 32 each.

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In the actual result, therefore, the shares have been issued by the Indian Company at a discount of that amount, and as this is the sum which in this litigation and upon this appeal the appellants, the Indian Company, contend represents the loss sustained by them in respect of this transaction, it is convenient to ask at once whether, even as so far stated by their Lordships, the facts do not furnish an immediate refutation of that contention.

It is, of course, necessarily grounded on the assumption that these issued shares of the Indian Company are in the hands of the English Companies fully paid and free from any liability for calls or otherwise. If the English Companies remain between them liable for the discount which has in fact now materialized then it necessarily follows—for no doubt as to the solvency of either English Company is suggested—that the Indian Company has sustained no loss at all. And upon the facts, as just detailed, that liability is, in their Lordships' judgment, fixed upon the English Companies by the application to this case of the principle enunciated by the Court of Appeal in the case of *Mosely* v. *Koffyfontein Mines, Limited*[2], where it was held that if an arrangement for the issue of shares is such that in the course of its due working out there is as much as a possibility that in the result the shares will have been issued at a discount, then the issue of the shares as fully paid cannot be justified. Here such a discount has in the result actually materialised; its very amount has been ascertained, and their Lordships, applying as they do, the principle just stated, reach the conclusion that the Indian Company's alleged loss has not been proved, and that its present appeal on this simple ground must fail.

But while this view was foreshadowed by the learned Commissioner, neither in the High Court nor in the arguments before the Board was the case dealt with so simply. Their Lordships accordingly will proceed to consider its further aspects.

The English Companies never, it seems, exercised their power of pledging the Burma shares. They retained them all, until in January, 1924, they sold them in England at 8*s*. a share, or Rs. 6 according to the then rate of exchange—making a total consideration of Rs. 2,62,76,628. This is equivalent to a price of £5 12*s*. for each £1 share in the original Burma Corporation. These shares were, as has been stated, worth in

2. (1904) 2 Ch. 108 at 118.

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British currency £14 each in February, 1920, and there can be no doubt that the English Companies have, by entering into their agreements with the Indian Company, sustained in England a very serious loss which they would have been spared had they in February, 1920, disposed of their Burma shares upon the open market. Nor can their Lordships doubt that this loss has really provoked the complaint made by the Indian Company in this case. But although the English Companies are the Indian Company's only shareholders, the question here is not whether the English Companies have sustained a heavy loss, but whether the Indian Company has sustained any loss at all. And on the assumption which their Lordships now make that the Indian Company's shares must be treated as fully paid that question depends upon the price which on that footing the Indian Company must be taken to have paid for the Burma shares. Did it exceed the sum finally received for them? That is the issue.

Now it is common ground between the parties that the intrinsic value of the Indian Company's shares on the 10th February, 1920, on the footing that the Company was then entitled to a free Burma Corporation £1 share for each of its 312,817 shares issued or to be issued was, at the then high rate of exchange, Rs. 98 only. How far that value would stand to be reduced if each Burma share instead of being "Good delivery" was one subject to the reservations and so forth of the principal agreement has not been gone into, and it need not for present purposes be here explored. Rs. 98 may without deduction be taken to be the value of each of the 156,408 shares issued in February, 1920, on the footing on which they were then issued. And in the first stages of their present dispute with the Revenue, the Indian Company, through its accountants, was prepared to adopt the then actual value of its shares issued as the criterion by which should be determined the question whether it had or had not sustained a loss on ultimate realisation. Its claim on this footing, however, was that the release on the 14th November, 1923, of the Indian Company's obligation to issue 312,817 shares or any shares beyond the first issue of 156,408, operated retrospectively to double the value in 1920 of these issued shares, so that each share must be taken to have then represented for the Company an expenditure of Rs. 196. When, however, it was pointed out that while this release of 1923 might enhance the then value of the issued shares in the hands of their holders, it in no way enhanced their value to the Indian

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Company in 1920, seeing that the shares had then been parted with once and for all, the alternative contention was put forward, on behalf of the Indian Company, and it was the contention placed before the Board, that the value to the Indian Company of its 156,408 shares at the date of issue must be taken to have been their nominal value of Rs. 200 each, no more and no less, on which basis the Indian Company has no realisation sustained, as is admitted, a loss of the above sum of Rs. 50,04,972.

The Indian Company's claim to have this loss allowed as a deduction from its super-tax assessment was in the first instance rejected by the Senior Taxing Officer, not however because the loss had not been sustained, but because, in his view, it was a capital and not a revenue loss.

After a series of appeals, in the course of which the view was taken that in the circumstances no loss of any kind had been sustained, but, on the contrary, a large profit had been made by the Indian Company, the High Court finally, by Order, dated the 17th December, 1925, under section 66 (3) of the Act, directed the Commissioner of Income-tax to make a reference to the High Court of the following question of law arising out of the Indian Company's super-tax assessment for the year 1924:—

"Whether the Commissioner of Income-tax was not bound in law to take as the price paid for the Burma Corporation shares the nominal value of the shares allotted [by the Indian Company] in payment therefor."

The Commissioner duly made the reference required and, on the matter coming before the High Court for hearing on the 5th October, 1926, that Court made an order purporting to be made in pursuance of section 66 (4) of the Act directing the Commissioner to deal in particular with a further question, namely, whether the alleged loss was a capital loss, and to find further facts and generally to amend the case. The Commissioner, after a further hearing of the parties, stated an additional case, and submitted to the Court two further questions, namely:—

(*A*) Whether the alleged loss in question (if any) was a capital loss or revenue loss; and

(*B*) Whether the alleged loss in question (if any) can be taken into account in view of the fact that it has accrued and arisen outside British India in view of the provisions of section 4 (1) and (2) of the Income-tax Act, 1922."

Their Lordships propose now to deal only with the original question, although they must refer again to the circum-

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stances in which the other two were stated. With reference to that question, the Commissioner, in his original letter of reference, after stating that each share of the Burma Corporation had been admitted by the Indian Company's accountants to be worth only Rs. 98 on the 10th April, 1920, submitted that the only reasonable inference was that each share of the Indian Company was only worth that amount. This finding was not in question before the Board. In his second letter of reference dealing with the contention which had then been set up that the case of In re *Wragg, Ltd.*[1] required the nominal value of the shares issued and that alone to be taken, the Commissioner, after a full review of the agreements which their Lordships have already discussed, stated his conclusion of fact to be that the whole scheme was as a simple purchase and sale of shares, illusory.

The case then again came before the High Court, and on the 5th March, 1928, that Court pronounced the judgment from which the present appeal is brought. Its view, broadly, was that the Court was brought under no compulsion by the decision in In re *Wragg, Ltd.*[1] to take the nominal value of the shares allotted by the Indian Company as necessarily representing the price paid by that Company for the Burma shares. The present case, in the opinion of the learned Chief Justice, was within the exception to that decision stated by A. L. Smith, L.J., in his judgment in In re *Wragg, Ltd.*[1] for that here the parties had themselves in effect—so great was the discrepancy—acknowledged the consideration received to have no relation in point of amount to that nominal value. The real value of each share in the Indian Company as issued could not have exceeded Rs. 98. It might, if other dates were taken, be found to have been even less. It was open to the Court to ascertain the true value. On any computation thereof the case of the Indian Company failed. It had made no loss on realization: on the contrary it had made, expressed in rupees as was right, a large profit—a profit in respect of each of its 156,408 shares worth only Rs. 98 at their date of issue, of as much as Rs. 70.

Now their Lordships are in full agreement that the Indian Company's case failed, as the High Court thought. But if *Wragg's* case[1] has any application to the present, and if it could not otherwise be distinguished, their Lordships would not as at present advised be prepared to follow the High

1. (1897) 1 Ch. 796.

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Court in so far as its final order was based upon the distinction there taken. As they understand the observations of Smith, L.J., referred to by the learned Chief Justice, these were confined to a case where upon the face of the agreement for the issue of fully paid shares it was made apparent that the actual consideration received by the Company was recognised as being definitely less than the paid-up capital issued in respect of it. The observations were not directed to a case like the present where that fact has to be ascertained, if at all, by extrinsic evidence.

But there appears to be a more certain ground upon which In re *Wragg, Ltd.*[1] if it has any application at all to the present question, may in the view of the Board be distinguished, and that is to be found in the conclusion of the learned Commissioner already stated, that the transaction here regarded as a purchase and sale of shares was illusory altogether. To a case of which so much can be said In re *Wragg, Ltd.*[1] has no application, and that conclusion of the learned Commissioner, as one of fact, was binding upon the High Court as it is also binding upon the Board, supported as it is by ample material, to some of which attention has already been called earlier in this judgment.

Their Lordships, however, do not wish it to be supposed that in their view the decision in In re *Wragg, Ltd.*[1] is in point here at all. Even if, on any application by the Indian Company to make the English Companies liable to contribute in respect of the shares issued to them, these Companies could successfully rely upon In re *Wragg, Ltd.*[1] as a defence, that result in their Lordships' opinion would have no influence upon the fortunes of the appellants' present appeal.

In re *Wragg, Ltd.*[1] was one of many cases—In re *Almada and Tirito Company,*[3] *Ooregum Gold Mining Company* v. *Roper*[4] and In re *Eddystone Marine Insurance Company*[5] are other notable examples—in which the question, always as between a Company or its Liquidator on the one hand and the allottee of the shares issued as fully paid on the other, was whether in his hands the shares were held free from liability for calls or otherwise. There is no such question here. To this litigation, the English Companies, the allottees of the shares, are not parties, nor, in law, are they even privies. The issue is

1. (1897) 1 Ch. 796.
3. (1888) 38 Ch. D. 415.
4. (1892) A.C. 125.
5. (1893) 3 Ch. 9.

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one between the Revenue and the Indian Company only, and the sole question now is what was the real value objectively of the fully paid shares issued to the English Companies by the Indian Company at the date when they were in fact parted with. It is not disputed by the appellants, the Indian Company, that the intrinsic value of these shares, if it had then exceeded their nominal value would have had to be returned as their true value. But their contention is that if, although judged by the same tests, their intrinsic value was then less than their nominal value, that last value, and no less, must be returned as their true value. This, they say, is the result of In re *Wragg, Ltd.*[1]

Their Lordships have some difficulty in grasping the argument. First of all, it is clear that there are some limitations to be placed upon the influence of In re *Wragg, Ltd.*[1] If, for example, the shares here had been issued to an individual who died on the next day, it could hardly even have been contended that by reason of In re *Wragg, Ltd.*[1] his estate would be charged with death duties in respect of any other than the real value of the shares whether that value was above or below their nominal value. Again, if immediately after the issue of the shares here the Company, upon proper resolutions passed, had presented a petition for the reduction of its capital on the ground that except to the extent of Rs. 98 per share its issued capital of 156,408 fully paid was unrepresented by available assets, can it be supposed that In re *Wragg, Ltd.*[1] would, of itself, have been any obstacle to an order confirming the reduction being made? Why then should that decision stand in the way of the real value of the shares being now in like manner ascertained? Their Lordships can only suppose the answer to be that the view is sub-consciously assumed that a Company by the issue of a share credited with a definite sum as paid thereon, becomes in some sense a debtor to its shareholder in respect of that full amount. But of course that is not so. A Company is in no sense debtor to capital. *Lee* v. *Neuchatel Asphalte Company*[6] and *Verner* v. *General and Commercial Investment Trust.*[7] The amount credited upon a share may, as between one shareholder and another, while the Company is a going concern, determine the proportion of profits receivable by him as dividend, and, in a winding up, his proportion of surplus assets. But it has no influence

1. (1897) 1 Ch. 796.
6. (1889) 41 Ch. D. 1.
7. (1894) 2 Ch. 239.

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to extend or increase the aggregate amount available for division in due course of administration amongst the whole body of shareholders; nor does it make the Company a debtor for any sum at all.

In their Lordships' judgment accordingly the decision in In re *Wragg, Ltd.*[1] ought to have no influence upon the question now raised, so that, however its claim be regarded, this appeal of the Indian Company fails.

Before parting with the case their Lordships think it right to allude again to the presentation to the High Court of the two additional questions to which they have already made reference, but which it is unnecessary for them further to consider. In the present case the only result of the presentation of these two questions was that a final decision of the case, on the first and only essential question, was delayed for nearly a year and a half and much additional expense was incurred. Their Lordships are fully alive to the circumstances in which the High Court was constrained to direct that these further questions should be referred to it for consideration, and the result in the present case of the order then made merely serves to confirm the view of the Board that the High Court will, in future cases, be well advised to require, before they seek to entertain any question under section 66 of the Indian Income-tax Act, that the preliminary requirements of the section are strictly complied with.

The stringency of these requirements is clearly deliberate. It is the intention of the enactment that the High Court is not to be flooded with such applications. The object is salutary and in their Lordships' judgment the High Court will be well advised, before they entertain any question under the section, always to see that the preliminary statutory conditions have been fully observed.

Upon the whole case, for the reasons they have given, their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellants: *E. F. Turner & Sons.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

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1. (1897) 1 Ch. 796.

PRIVY COUNCIL.

[On appeal from the Supreme Court of the Straits Settlements (Penang).]

PRESENT:—LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE AND LORD RUSSELL OF KILLOWEN.

Khoo Hooi Leong .. *Appellant**

v.

Khoo Chong Yeok .. *Respondent.*

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Khoo Hooi Leong *v.* Khoo Chong Yeok.

Straits Settlements—Chinese domiciled in—T'sip or secondary wife of—Proof of—Presumption of, from recognition of son—Divorce of—Son of, if legitimate—Illegitimate natural son—Legitimation of, by subsequent recognition.

Held, on the evidence that *P* was not a t'sip or lawful secondary wife of the settlor, and that the association between them was merely of a temporary or casual character.

The mere fact of recognition of a person as a son cannot raise any presumption of marriage between the parents.

According to Chinese custom a t'sip cannot be put away who has borne a son and in the Straits Settlements there is no divorce provided for by the laws of the Chinese.

According to the law operative in the Straits Settlements the son of a t'sip or secondary wife will be legitimate being a son by a lawful wife.

The Chinese custom of legitimation of a natural son by subsequent recognition is not part of the law operative in the Straits Settlements.

Legitimation of a child, whose parents are not husband and wife, is unknown and repugnant to the common law of England, and no hardship (much less injustice or oppression) need result from a refusal to admit a modification in this respect of the English Law in its application to Chinese.

Appeal No. 82 of 1929 from a decree of the Supreme Court of the Straits Settlements, dated 11th August, 1928, affirming a decree of Sproule, J., dated 22nd February, 1928.

A. M. Dunne, K.C. and *F. O. Langley* for appellant.

Gavin T. Simonds, K.C. and *Greenland* for respondent.

25th February, 1930. Their Lordships' judgment was delivered by

Lord Russell.

LORD RUSSELL OF KILLOWEN.—This appeal is brought from a decree of the Supreme Court of the Straits Settlements, dated the 11th August, 1928, by which an appeal from a decree (dated the 22nd February, 1928) of Mr. Justice Sproule was dismissed. This last-mentioned decree was made upon the further consideration of an action and upon a summons to vary a certificate made therein by the Registrar in answer to an

*P.C. Appeal No. 82 of 1929. 25th February, 1930.

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enquiry which had been ordered by the judgment in the action. The enquiry was framed in the following terms:—"An enquiry whether the said Khoo Hun Tee was a legitimate son of the settlor." The settlor was one Khoo Thean Tek, and he is referred to hereinafter as the settlor.

By his certificate the Registrar had found that Khoo Hun Tee was a legitimate son of the settlor. Mr. Justice Sproule reversed that finding, and declared that Khoo Hun Tee was not a legitimate son of the settlor. The Court of Appeal affirmed the decision of Mr. Justice Sproule.

The effect of the decision of Mr. Justice Sproule and the Court of Appeal is to exclude Khoo Hun Tee from the class of "my sons and grandsons" who are to take as beneficiaries under the trusts of a settlement of land in Penang executed by the settlor on the 8th December, 1888. Their Lordships, however, are not concerned with any question either as to construction or otherwise arising under this settlement. They have only to determine whether the decision under appeal is or is not correct.

Most of the relevant facts are not in dispute. The settlor was a Chinese domiciled in Penang, who had in addition to a t'sai, or principal wife, one or more t'sips, or lawful secondary wives. During some period of time (the extreme limits of which are stated later) he was in sexual association with a woman named Petronella, who as a result of this association gave birth to Khoo Hun Tee on the 22nd January, 1854.

As to Petronella, she was born in Penang and was baptized on the 26th June, 1831, at the Catholic Church of the Assumption in the town of Penang. She was the daughter of Felix Baptist and Ann Jeremiah. On the 19th April, 1847, she was married at the same church to Richard Gaudoin. On the 25th August, 1848, a daughter was born of that marriage, who was baptized at the same church on the 3rd September, 1848. The next two events established concerning Petronella are the birth of her son Khoo Hun Tee in 1854, and the birth of an illegitimate daughter on the 26th August, 1856. This daughter was baptized at the Catholic Church of the Immaculate Conception, Pulo Tikus, Penang, on the 15th September, 1856; and on the 13th March, 1857, Khoo Hun Tee was baptized at the same church, being described in the register as "Edward Baptist, illegitimate son of Petronella Baptist about 4 years old." It is not known who was the father of the illegitimate daughter; but it it is common ground that the settlor was the

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father of Khoo Hun Tee. On the 5th February, 1861, Petronella was married at the same church to one Henry Cornelius. In the marriage register she is described as "Petronella Baptist, adult, legitimate daughter of Felix and Anna Baptist, and widow of Richard Gaudoin." Nothing is known as to where or when Richard Gaudoin died. Petronella died in 1886. There is no dispute as to any of the above facts.

The Registrar's certificate of Khoo Hun Tee's legitimacy was based upon alternative findings of facts. He found that Petronella was a t'sip, or lawful secondary wife, of the settlor; and that even if she were not, yet Khoo Hun Tee had been legitimated by subsequent recognition.

Before considering the correctness of these findings it is necessary to state that in their Lordships' view the inquiry is to be answered by ascertaining whether Khoo Hun Tee was the legitimate son of the settlor in accordance with the law operative in the Straits Settlements, the test being whether he would be entitled to enjoy the civil rights which according to that law would be enjoyed by a son of the settlor.

If Petronella had in fact been a t'sip or secondary wife of the settlor there would be no room for doubt upon the question whether in accordance with the law operative in the Straits Settlements Khoo Hun Tee was legitimate. He would be legitimate being a son by a lawful wife, for polygamy amongst the Chinese is recognized by the Courts of the Colony.

Their Lordships, however, agree with the views expressed by Mr. Justice Sproule that the evidence does not justify any finding that Petronella was a t'sip or lawful secondary wife of the settlor. Even if (contrary to the usual presumption) it were assumed that at the time when Khoo Hun Tee was conceived Richard Gaudoin was in fact dead, so that Petronella was soluta or free to marry, nevertheless the evidence establishes nothing that is inconsistent but much that is only consistent with the view that the association between Petronella and the settlor was merely of a temporary or casual character.

There are many facts in the case which render it most improbable that Petronella occupied the status of a t'sip or that her association with the settlor was intended to be of a permanent nature. She was a Catholic, who never definitely abandoned her religion. So far as the evidence goes no association with the settlor is proved before the date when Khoo Hun Tee was conceived, *viz.*, somewhere about May, 1853. Her illegitimate daughter was born in August, 1856, and baptized within

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three weeks of birth. Her association with the settlor must have ceased by that time, and in all probability had ceased before the daughter was conceived, *i.e.*, before November, 1855. The period of association between these two persons may, upon the evidence, have only lasted between May, 1853, and November, 1855. But even taking the outside limits of its possible duration, *viz.*, between 1848 (when the legitimate daughter was born) and 1861 (when Petronella married Cornelius), their Lordships are of opinion that there is no evidence that the parties intended their union to be permanent in its nature. Moreover, the fact that the association between the parties was in fact severed affords strong evidence that Petronella was never a t'sip, for according to the evidence of Mr. Beatty (the only expert on Chinese custom who was called) a t'sip cannot be put away who has borne a son and "in the Straits Settlements there is no divorce provided for by the laws for the Chinese."

In the opinion of their Lordships it is impossible to find upon the evidence that Petronella was a t'sip or lawful secondary wife of the settlor.

Unless Khoo Hun Tee was legitimate upon some other ground the appeal must fail.

An alternative argument was presented on behalf of the appellant, based upon the Registrar's finding that Khoo Hun Tee had been legitimated by subsequent recognition.

It is unnecessary to refer in detail to the evidence adduced on this head, because the respondent concedes (and in their Lordships' opinion rightly concedes) that the evidence of recognition would be sufficient to establish legitimation by recognition according to Chinese custom.

The crucial question then arises, *viz.*, was he a legitimate son of the settlor according to the law operative in the Straits Settlements? In other words, is the Chinese custom of legitimation by recognition part of the law operative in the Colony?

That the law operative in the Straits Settlements recognises as legitimate the children of a t'sip is clear from the decision of this Board when the present litigation came under its consideration in 1926. In delivering the judgment of the Board Lord Phillimore uses the following language in considering the status of a t'sip and her children:

"It is said that for a long time such a union was considered as carrying with it no legal consequences, and the children were deemed frankly

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illegitimate throughout the Straits Settlements. But in the *Six Widows'* case[1] the Supreme Court of the Straits Settlements decided in the year 1908 that a 't'sip' or secondary wife is entitled to take a widow's share in the estate of her deceased husband, she being equivalent for this purpose with a 't'sai' or principal wife; and following this doctrine to its logical conclusion, the same Court held that the children of a 't'sip' were entitled to inherit equally with the children of a 't'sai.' In the later case the same Court decided that no form of marriage ceremony was necessary for creating the position of a 't'sip,' and an appeal having been taken to His Majesty in Council, this Board advised that the judgment should be affirmed, thereby also inferentially affirming the previous judgment. This case is reported as *Cheang Thye Phin* v. *Tan Ah Loy.*[2]"

On the other hand, daughters are admitted to share on an intestacy, in other words, the Chinese custom which excludes females from sharing in the estate of a Chinese intestate does not apply in the Straits Settlements: *Lee Joo Neo* v. *Lee Eng Swee*[3]; or to state the position in other language, the English law of succession is not modified in its application to Chinese residents in the Colony by incorporating the Chinese custom of excluding females.

Furthermore, by the law operative in the Colony the adopted son of a Chinese intestate has no right to share in the intestate's estate. This is stated by Mr. Justice Sproule to have been settled law ever since the judgment (in 1858) of Sir Peter Maxwell in *Reg.* v. *Willans.*[4] In 1877 Sir Theodore Ford adopted that view after reviewing the earlier decisions (see *Khoo Tiang Bee* v. *Tan Beng Gwat.*[5])

The case of a natural son alleged to have been legitimated by subsequent recognition under Chinese custom does not appear to have arisen for consideration until the present case.

Mr. Justice Sproule (and Mr. Justice Stevens in the Court of Appeal) held that the Chinese custom of legitimation of a natural son by subsequent recognition was not part of the law operative in the Colony. Their Lordships agree with that view.

The modifications of the law of England which obtain in the Colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified. That was the view expressed by Sir Peter Maxwell, C.J., in *Choa Choon Neo* v. *Spottiswoode*[6]; and this Board, in the case of *Yeap Cheah Neo* v. *Ong Cheng Neo,*[7] stated that in Sir Peter Maxwell's judgment

1. (1908) 12 S.S.L.R. 120. 2. (1920) A.C. 369. 3. 4 Kyshe 325.
4. 3 Kyshe 16. 5. 1 Kyshe 413.
6. 1 Kyshe 216 at 221. 7. L.R. 6 P.C. 381 at 396.

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"the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the Colony are correctly stated."

From the above-mentioned necessity arises the recognition by the Courts of the Colony of polygamous marriages among the Chinese, and, as a logical consequence, the recognition of the legitimacy of the offspring (whether male or female) of such marriages.

Their Lordships, however, are unable to find any grounds which would justify such a modification of English law as to treat an illegitimate natural son as legitimated by the mere fact of subsequent recognition. Legitimation of a child, whose parents are not husband and wife, is unknown and repugnant to the common law of England, and no hardship (much less injustice or oppression) need result from a refusal to admit a modification in this respect of the English law in its application to Chinese.

Their Lordships are of opinion accordingly that the appellant's alternative contention also fails.

There remains for consideration an additional argument urged on his behalf. It was said that the fact of recognition, established as it was by the evidence, raised a presumption in favour of the view that the mother of Khoo Hun Tee was a t'sip, that such presumption had not been rebutted, and that Khoo Hun Tee should, therefore, be held to be legitimate.

In their Lordships' opinion this argument is destroyed by the evidence of Mr. Beatty, from which it would appear that, according to Chinese custom, "a mistress may not be recognized and yet her son may"—or, as he phrases it in another passage, "legitimisation of the son does not necessarily imply legitimisation of the mother." In the face of this statement as to Chinese custom the mere fact of recognition of a person as a son cannot, in their Lordships' view, raise any presumption of marriage between the parents.

For these reasons their Lordships will humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Solicitors for appellant: *Herbert Z. Deane & Co.*

Solicitors for respondent: *Shelton & Co.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR LANCELOT SANDERSON.

Musammat Nawasi Begam and another .. *Appellants**

v.

Musammat Dilafroz Begam and others .. *Respondents.*

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Musammat Nawasi Begam *v.* Musammat Dilafroz Begam.

Civil Procedure Code (V of 1908), S. 11, Expl. (iv)—Mahomedan Law—Dower—Widow taking possession of entire husband's estate under claim to—Suit by other heir for possession of his share of estate—Widow's claim to dower in—Interest on dower in arrear—Claim to—Omission to put forward—Claim res judicata *by reason of.*

On the death of a Mahomedan, one-fourth of his property devolved upon his widow, and three-fourths on his cousin, while the widow being so entitled took possession of the whole of the estate in lieu of her dower. Thereafter, assignees from the cousin, alleging that the widow's dower had long before been discharged from her usufruct of the estate, sued for the unconditional delivery of possession to them of a three-fourths share of the estate. The plaint contained an alternative prayer for the delivery of such share on payment of such portion of the dower debt as might be found to be due. In that suit it was found that a portion of the dower debt was still due, and a decree was passed for the delivery of possession of the share sued for on payment by the plaintiffs of the amount so found due for dower. In arriving at the balance due for dower, that decree did not, however, take into account the interest upon the dower in arrear, no such claim having been put forward by the widow. The amount decreed for dower was not paid and possession was retained. In a suit for possession of the three-fourths share subsequently instituted by the representative-in-interest of the plaintiffs in the prior suit against the widow or her representative-in-interest, *held,* that a claim by the latter to charge any interest in respect of the period during which dower remained unpaid was barred under Section 11, Expl. (*iv*), Civil Procedure Code.

In the first suit, the widow's claim to interest was one which might, and which ought to, have been made ground of defence.

Appeal No. 14 of 1929, by special leave, from a judgment and decree of the High Court, Allahabad, dated the 9th June, 1926, affirming a judgment and decree of the Court of the Subordinate Judge of Farrukhabad, dated the 8th February, 1923.

The material facts of the case, for the purposes of the report, are sufficiently fully set out in their Lordships' judgment and in the judgment of the High Court reported in 24 A.L.J. 910.

Dunne, K.C. and *Dube* for appellants.

Majid for respondents.

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*P.C. Appeal No. 14 of 1929. 13th March, 1930.
Allahabad Appeal No. 29 of 1926.

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Musammat Nawasi Begam v. Musammat Dilafroz Begam.

Dunne, K.C., for appellants, refers to the judgment of Mr. Justice Karamat Hussain in *Hamira Bibi* v. *Zubaida Bibi*,[1] which was upheld by the Board in *Hamira Bibi* v. *Zubaida Bibi*.[2] Interest on dower is claimable by way of compensation for forbearance in suing. Our claim for interest should be allowed in view of the equitable considerations laid down by the Board in the case last cited. No question of *res judicata* arises.

During the argument, reference was also made to *Maina Bibi* v. *Chaudhri Vakil Ahmad*[3] and *Bakreedan* v. *Ummatul Fatema*.[4]

Counsel for the respondents was not called upon.

13th March, 1930. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—The property which is the subject-matter of the suit out of which this appeal has arisen belonged to one Abdul Shah,* who died on the 9th October, 1881, leaving him surviving his widow Zamani Begam and his cousin Mansur Shah. According to the Mahomedan law, one-fourth of the property of the deceased devolved upon his widow and three-fourths upon Mansur Shah, while the widow being so entitled took possession of the whole of the estate in lieu of her dower which, as she claimed, amounted to Rs. 50,000. Thereafter Mansur Shah, having assigned a one-half share out of his three-fourths interest to Usman Shah and Zamani Khan, joined with them in April, 1892, in filing a suit against the widow in the Court of the Subordinate Judge of Farrukhabad, alleging that her dower amounted to no more than Rs. 1,000, and that it had long ago been discharged from her usufruct of the estate, and claiming (1) that possession should be delivered to them unconditionally of a three-fourths share of the estate, and (2) that if any portion of Musammat Begam's dower was found to be due a decree should be passed in their favour for possession on payment of the dower due.

The suit went to judgment. The District Judge by his order, dated the 17th April, 1893, decreed it against the widow. She died on the 7th June, 1894, and thereafter an appeal against the decree was preferred to the High Court at Allahabad by the present appellants who are her heirs and legal representatives. That Court allowed the appeal; it held that the dower was

1. (1910) I.L.R. 33 A. 182.
2. (1916) L.R. 43 I.A. 294: I.L.R. 38 A. 581: 31 M.L.J. 799 (P.C.).
3. (1924) L.R. 52 I.A. 145: I.L.R. 47 A. 250: 48 M.L.J. 667 (P.C.).
4. (1905) 3 C.L.J. 541.
*Afzal Shah.—K.J.R.

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Rs. 50,000, and on the 2nd June, 1896, it made the following decree, on which the whole question now at issue turns. "It is ordered and decreed that this appeal be allowed, and in modification of [the decree appealed from] it is ordered that the plaintiff-respondents do receive possession of the property specified in the said decree on payment by them to the defendants-appellants of the sum of Rs. 35,223 minus the amount of the profits arising from the plaintiff-respondents' three-fourths share of the property in the possession of the defendants-appellants from the date of the Lower Courts decree up to the date when possession may be obtained by the plaintiff-respondents."

With reference to that decree it is agreed that, in arriving at the figure of Rs. 35,223 as the sum which had to be paid if the widow's claim to dower was to be extinguished, no interest upon the dower in arrear was taken into account; in fact, in that suit no claim was put forward either by the widow herself or by the present appellants, as her successors-in-interest, that she was entitled to any such interest and the amount to be paid was assessed upon the footing that no such claim existed.

Now the present suit is brought by a plaintiff who has succeeded to an interest in the three-fourths which formerly belonged to Mansur Shah. She is, therefore, his successor-in-interest. Her claim is that upon the taking of proper accounts possession may be delivered to her of her share of the estate with mesne profits, interest and costs, all on the footing that the widow and her representatives have already been paid in full the amount of her dower through the usufruct of the estate of which she and they have had continuous possession. It has, upon that claim, been made clear from the discussion which has taken place before the Board, that upon the pleadings the only real question which has now to be decided between the parties is whether those representing the widow, in taking the account of the amount still remaining due in respect of dower, are entitled to charge any interest in respect of the period during which dower remained unpaid. Both by the Subordinate Judge and by the High Court it has been held that no interest can be charged by them if only for the reason that no claim for interest was in the former suit made by or on behalf of the widow, and that any claim for interest is now *res judicata*. It is agreed that if that view be correct, the appeal must fail, whatever view might be taken by the Board of the other reasons assigned by the Courts below for the same conclusion.

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And their Lordships are of opinion that that view is correct. It is quite clear, as it appears to them, that in the first suit, the widow's claim to interest was one which might, and which ought to, have been made ground of defence; and under the provisions of the Code of Civil Procedure, whereof so much can be asserted a suit by the decree in which the parties to the second suit are bound (as is the case here) then such a claim may not again be reopened in the later suit. It follows that the appeal fails, and their Lordships will humbly advise His Majesty that it be dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K. J. R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Chief Justice,* MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

T. Manavedan Tirumalpad, Senior Raja of Nilambur .. *Respondent.*

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The Commissioner of Income-tax, Madras v. Manavedan Tirumalpad.

Income-tax Act (XI of 1922)—Whether amounts received from sale of timber trees are income.

The amounts received from the sale of timber trees are income and as such liable to income-tax.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

'I have the honour to refer the following case for the decision of the High Court under section 66 (2) of the Income-tax Act (XI of 1922).

2. The petitioner who is the owner of extensive unsurveyed and unassessed forest lands in Malabar and the Nilgiris was assessed for the year 1928-29 by the Income-tax Officer, Palghat, on an income of Rs. 5,395 from property and Rs. 3,07,629 income from fees received in respect of timber cut and removed from the forests and other miscellaneous receipts. This sum of Rs. 3,07,629 was wrongly classified by the Income-tax Officer under the head "Other sources". The greater part of the income which relates to fees for timber felled and removed and profits from sale of

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*O.P. No. 152 of 1929. 11th April, 1930.

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elephants should have been classified under the head "Business." In computing the income of Rs. 3,07,629, the Income-tax Officer included a sum of Rs. 1,19,098 claimed as a deduction by the petitioner as being a receipt of a capital nature. This sum is said to represent the estimated capital value of the timber cut and removed from the petitioner's forest in return for which he received certain "Kuttikanom" fees. The petitioner contended that by the sale of the timber in the forest he was practically converting a good portion of the capital into cash and that to the extent of the sum of Rs. 1,19,098 (50 per cent. of the Kuttikanom fees), the receipts from Kuttikanom fees should be regarded as receipt of a capital nature. The Income-tax Officer declined to accept this contention and disallowed the claim. The petitioner thereupon appealed to the Assistant Commissioner but without success. An extract from the Assistant Commissioner's order is filed—Exhibit A.

3. The petitioner has now applied to me to refer for the decision of the High Court the following question of law, *viz.*:—

"Whether the amounts received by sale of timber trees are income, liable as such to income-tax."

The petitioner is conducting a business in the sale of forest produce. He does not sell the land with the produce growing on it. He sells only the produce of the forest or that which the forest yields. His business is of the same nature as that carried on by a person working a mine or a quarry. The petitioner's claim in this instance amounts to one for an allowance for the exhaustion of the capital. It is a well-established principle of Income-tax law, that for the purposes of taxation no deduction can be made from profits for the exhaustion of capital. There is nothing peculiar to this case to distinguish it from other decided cases in which this principle has been applied. I would, therefore, ask your Lordships to answer the question propounded in the affirmative.

T. R. Venkatrama Sastri and *T. B. Balagopal* for assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

The Court delivered the following

JUDGMENT.—The question referred to by the Commissioner of Income-tax is:

"Whether the amounts received by sale of timber trees are income, liable as such to income-tax."

The assesssee is the owner of unassessed forest lands in Malabar and was assessed by the Income-tax Officer, Palghat, for the year 1928-29 on an income of Rs. 5,395 from property and Rs. 3,07,629 from fees received in respect of timber cut and removed from the forests and other miscellaneous receipts. The assessee objects to the latter assessment. Before the Com-

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missioner his contention was that he had purchased the forests with trees growing therein and that as the trees were cut down and carried away the capital was thereby decreased. The Commissioner of Income-tax has pointed out that similar circumstances exist in the case of mines and quarries—this is conceded by Mr. Venkatrama Sastri who appears for the assessee—and that in neither of those cases is any deduction allowed by reason of the fact that as years go on the amount of coal under the land in the case of the mines is diminished and the amount of the stones to be quarried in the case of the quarry is diminished. Similar views have been taken in the English Courts with regard to minerals. Mr. Venkatrama Sastri here argues that this is not to be treated as assessable income at all although he admits that he can see no difference between the income derived from the sale of coal and the sale of stone quarried in a quarry or from income derived from the sale of paddy grown in land. Of course we are unable to distinguish between the income derived from the sale of paddy which is grown on land and the income derived from the sale of timber cut in a forest; but the profits earned from the sale of paddy would be assessable to income-tax but for the special exemption given to that income in the Income-tax Act by reason of its being agricultural income. There is no such exemption in the case of income derived from the sale of timber. Under the circumstances, we answer the question referred to us in the affirmative. The assessee will pay Rs. 250 costs to the Commissioner of Income-tax.

K.C. *Reference answered in the affirmative.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Chief Justice*, MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

Chintala Venkatasubbiah (died) and another .. *Appellants**
(Appellant and his L. R.)

v.

Kattapalli Akamma .. *Respondent (Respondent).*

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Venkatasubbiah *v.* Akamma.

Civil Procedure Code (V of 1908), *O.* 21, *Rr.* 71 *and.* 84—*Meaning of word "forthwith" in R.* 84—*Non-payment of deposit—Re-sale after fresh proclamation—Deficiency in price—Liability of purchaser to make it good.*

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*L.P.A. No. 250 of 1927. 24th April, 1930.

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The word "forthwith" in O. 21, R. 84, Civil Procedure Code, means "as expeditiously as circumstances permit," in other words, within "such time as appears to be reasonably early having regard to all the circumstances".

Where a Court auction-purchaser failed to pay the deposit, as required by O. 21, R. 84, and the executing Court, after having the property again proclaimed for sale in the interests of the defaulting bidder, held the resale about two months after the original sale and the deficiency in price was sought to be recovered from the defaulting purchaser,

Held, that under those circumstances the resale can be said to have been held "forthwith" and the purchaser is liable to make good the deficiency on resale. In such a case, though it is not obligatory for a fresh proclamation to be issued, yet, if the same is issued in the interests of the auction-purchaser, it cannot be said that on that account there was unreasonable delay in holding the resale.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Jackson, dated 9th August, 1927, and passed in A.A.A.O. No. 6 of 1926 preferred to the High Court against the decree of the District Court of Guntur, dated 11th March, 1925, and passed in A.S. No. 253 of 1924 preferred against the order of the District Munsif of Narasaraopet, dated 21st January, 1924, and made in E.A. No. 1088 of 1923 in O.S. No. 945 of 1921.

This Appeal was first heard by their Lordships Jackson and Thiruvenkatachariar, JJ., who delivered the following differing judgments on the 9th August, 1927:—

Jackson, J.—Appeal against Appellate Order of the District Judge of Guntur in A.S. No. 253 of 1924.

The appellant bid at a Court sale, and failed to deposit 25 per cent. as prescribed by Order 21, Rule 84 of the Code of Civil Procedure. There was a re-sale when the price was less by Rupees Six hundred and thirty (Rs. 630). The appellant has been ordered under Order 21, Rule 71, to make good the deficiency. He pleads that he cannot be so ordered because the resale was not held forthwith as required by Order 21, Rule 84.

The sale was held on 1st September, 1923 and closed at 5 P.M. on that day. Then the appellant defaulted, and obviously the sale could not have proceeded at once. The 2nd and 3rd were holidays. By the 4th the would-be bidders had dispersed and the Court proclaimed a fresh sale which was held on 5th November, 1923.

The learned Judge is prepared to hold that whenever there is failure to deposit the 25 per cent. and consequent resale there must be a proclamation, because Rule 84 says forthwith resold, Rule 85, in regard to the 75 per cent. says, resold, and Rule 87 says every resale of property in default of payment within the period allowed for such payment shall be made after the issue of a fresh proclamation. But obviously Rule 87 can only apply to a default

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under Rule 86, because otherwise there would be no sense in the phrase "forthwith resold" in Rule 84.

It remains to consider whether "forthwith resold" lays a statutory obligation upon the Court to resell immediately after the default is made, which in this case would have been very late in the evening of September 1st. Such a literal interpretation would almost invariably entail extreme hardship upon the defaulting purchaser; the main body of bidders, as in this case would have gone thinking that the sale was finished, the property would be knocked down for a low price, and the deficiency to be made good would be proportionately raised. 'Forthwith' here only means that the Court can go straight ahead without the obligation prescribed in the latter case under Rule 86, of issuing a fresh proclamation; there is no particular insistence or instantaneousness which in the context would be stupid. As expeditiously as circumstances permit would probably be a good rendering of the sense. As explained, the Court could not resell on the same or even on immediately subsequent days, and, therefore, it issued another proclamation which was the fairest treatment the appellant could wish.

There is no reason to hold that the fresh proclamation in this case was irregular.

Accordingly the appeal fails on all grounds and is dismissed.

Thiruvenkatachariar, J.—The appellant before us was declared to be the purchaser of an item of immoveable property sold in execution of the decree in O.S. No. 945 of 1921 on the file of the District Munsif's Court, Narasaraopet, on the 1st September, 1923. He failed to pay the deposit of 25 per cent. on the amount of his purchase money to the officer conducting the sale. The default made by the purchaser was reported to the District Munsif later on in the day by the Nazir who conducted the sale. The 2nd and 3rd September were holidays, and on the 4th September, 1923, which was the next Court day, the District Munsif ordered that the property should be proclaimed for sale and resold. The re-sale took place on 5th November, 1923, and resulted in a deficiency of Rs. 630. The judgment-debtors thereafter applied under Order 21, Rule 71 for the recovery from the defaulting purchaser of the deficiency of price resulting from the re-sale by reason of the purchaser's default, together with expenses of the re-sale.

The main contention of the appellant, which is practically the only one which is pressed before us, is that he is not liable under Rule 71 for the deficiency of the price because the re-sale was not made forthwith as required by Order 21, Rule 84, Civil Procedure Code. This contention was overruled by both the Lower Courts and the appellant has been held liable for the deficiency of the price as claimed by the judgment-debtors. The learned District Judge has considered this question in paragraph 3 of his judgment, and

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his conclusion is that the language of Rule 84 differs materially from that of the corresponding provision in the Code of 1882, and the re-sale which is directed under Rule 84 has to be made after the issue of a fresh proclamation, and in that respect it stands on the same footing as a re-sale ordered under Rule 87 in default of payment of the purchase money. In that view he holds that the re-sale in this case was made forthwith as the District Munsif directed on the 4th September, the issue of fresh proclamation for the re-sale.

I am unable to agree with the view taken by the learned District Judge as regards the effect of the alteration in the language of Rule 84, by the substitution of the word "re-sold" for the expression "put up again and sold" in section 306 of the old Code. I may here refer to the provisions of sections 307 to 309 of the old Code. Under section 308, the property shall be re-sold if the full amount of the purchase money is not paid into Court within the period mentioned in section 307. Then section 309 provided that

"Every re-sale of immoveable property, in default of payment of the purchase money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale."

Section 293 corresponding to Rule 71 provided that

"Any deficiency of price (if any) which may happen on a re-sale under this Code by reason of the purchaser's default, and all expenses attending such re-sale . . . shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulter."

As the word used in section 293 is "Re-sale," the question was raised in several cases whether the sale held under section 306 in default of payment of the deposit amount was a re-sale within the meaning of section 293, and it was held that it was a re-sale. See *Vallabhan* v. *Pangunni*,[1] *Ramdhani Sahai* v. *Rajrani Kooer*,[2] *Javherbai* v. *Haribhai*[3] and *Rajendra Nath Roy* v. *Ram Charan Sinha.*[4]

It seems to me that all that the legislature did by the change in the language to "re-sold" was merely to affirm the construction put by the Courts on the expression "put up again and sold" so as to obviate any room for doubt. In my opinion, there has been no alteration in the substance of Rule 84, by the change in the language, and I find that is also the view taken by Shadi Lal, J., in *Beli Ram* v. *Sohan Singh.*[5] If that be so, the view taken in the cases already cited that for a re-sale under section 306, in default of payment of the deposit no fresh proclamation is necessary would equally apply to cases under Rule 84. The same conclusion is also reached by comparing Rule 84 with Rule 87.

1. (1889) I.L.R. 12 M. 454. 2. (1881) I.L.R. 7 C. 337.
3. (1881) I.L.R. 5 B. 575. 4. (1898) 2 C.W.N. 411.
5. (1916) 32 I.C. 907.

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Under the latter Rule, the issue of fresh proclamation is made obligatory in the case of a re-sale of immoveable property in default of payment of the purchase money within the period allowed for such payment which is provided for by Rule 85. But Rule 84 deals only with the payment of deposit of 25 per cent. which has to be paid immediately and in default of such deposit, the re-sale must be held forthwith. In my opinion, the difference between the provision in Rule 84 and the provision in Rule 87 clearly shows that a re-sale under Rule 84 does not require fresh proclamation.

The only remaining question, therefore, is whether the re-sale in this case which was held on 5th November, 1923, is open to the objection that it was not held forthwith. This question, I need hardly say, was not considered by the learned District Judge as on the view he took, it did not arise. The word "forthwith" occurs in the old Code as well as in the present Code, and the meaning given in the Oxford Concise Dictionary is 'immediately without delay.' So, where a statute requires anything to be done "immediately," that is the same thing as "forthwith"; and implies "speedy and prompt action and an omission of all delay; in other words, that the thing to be done should be done as quickly as is reasonably possible" (per Cockburn, C.J., in *R.* v. *The Justices of Berkshire*[6]).

In *Ex parte Lamb*[7] Jessel, M.R., observes as follows:—

"I think that the word 'forthwith' must be construed according to the circumstances in which it is used. Where, as in *Hyde* v. *Watts*,[8] there is a covenant to insure a man's life, there must of necessity be some delay, for the act could not be done in a moment. But where an act which is required to be done 'forthwith' can be done without delay, it ought to be so done."

Comparing the language of Rule 84 with that of Rules 86 and 87, there can be hardly any doubt that the re-sale under Rule 84 should be held with as little delay as possible, and for that reason no fresh proclamation for the re-sale is prescribed as it is for a re-sale under Rule 87.

In the case before us the delay of over two months was due to the District Munsif acting on the view that a fresh proclamation was necessary for the re-sale. The introduction of a needless formality no doubt accounts for the delay, but does not justify it, and an act so done cannot be regarded as done without avoidable delay. I am therefore of opinion that the sale which was held on the 5th November was not a sale held forthwith within the meaning of Rule 84.

If, then, there has been no compliance with the direction given in Rule 84, and the sale was not held forthwith, can the defaulting

6. (1878) 4 Q.B.D. 469. 7. (1881) 19 Ch. D. 169 at 173.
8. (1843) 12 M. & W. 254.

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purchaser be held liable for the deficiency of the price under Rule 71? His liability for the deficiency of the price is a statutory one resting on Rule 84, read with Rule 71, and if Rule 84 has not been complied with, Rule 71 cannot be applied.

It is contended that the re-sale though not held in strict accordance with Rule 84, cannot be treated as a nullity, and that a further question will have to be considered whether the appellant has been materially prejudiced by the procedure adopted, and if that question is found in the negative, he should be held liable. In my opinion, such questions are irrelevant if it is found that the re-sale was made in plain violation of Rule 84.

I would, therefore, allow the appeal and dismiss the respondent's (judgment-debtor's) application with costs throughout.

Ch. Raghava Rao for appellants.

Respondent not represented.

The judgment of the Court was delivered by

Beasley, C.J.

The Chief Justice.—This Letters Patent Appeal comes before us on account of a difference of opinion between Jackson and Thiruvenkatachariar, JJ., upon one point.

The facts of the case are as follows:—The appellant bid at a Court sale, his bid was accepted, but he failed to pay the 25 per cent. deposit as is prescribed by Order 21, Rule 84, Civil Procedure Code. Having defaulted in the payment of the deposit, a fresh proclamation was issued and a re-sale of the property held. This sale resulted in a deficiency of Rs. 630 and the appellant was ordered under Order 21, Rule 71, Civil Procedure Code, to make good the deficiency. He objects to that order on the ground that the sale was not held 'forthwith' to use the word which appears in Order 21, Rule 84, Civil Procedure Code, which provides that upon failure of a bidder to pay the 25 per cent. deposit the property shall 'forthwith' be re-sold. The sale at which the appellant defaulted was held on the 1st September, 1923, and closed at 5 P.M. that day. The appellant, as before stated, failed to pay the 25 per cent. deposit; the next day and the day after that were holidays and on the 4th September a fresh proclamation was directed to be issued proclaiming the property for sale and the sale was held on the 5th November, 1923, and resulted, as before stated, in a deficiency.

The District Munsif, before whom the matter came, after going in detail into the facts and into the law, seems to us to have come to the conclusion that although a fresh proclamation

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was not obligatory, it was necessary in the interests of the defaulting bidder to proclaim the property again for sale. We may say at once that we think that in the interests of the defaulting bidder it was necessary for the property to be again proclaimed for sale. Had the property been put for sale on the 4th September, clearly there would have been no notice to prospective bidders and very likely no bidder would have attended the sale at all. In the Lower Appellate Court, however, the District Judge took the view that, where a bidder defaults in payment of the deposit, the property cannot be re-sold unless there has been a fresh proclamation of sale; and he held upon that basis that, as the sale of the property had to be freshly proclaimed, the sale had been held 'forthwith.'

When the matter came before Jackson and Thiruvenkatachariar, JJ., they agreed that a fresh proclamation is not necessary under such circumstances but disagreed on the question as to whether the property had been sold 'forthwith.' Jackson, J., took the view that although it was not obligatory to freshly proclaim the sale, nevertheless in the interests of the defaulting auction-bidder, it should be freshly proclaimed, that there had been no unnecessary delay and that the sale should be said to have been held 'forthwith'. He gave his understanding of the word 'forthwith' and rendered it as follows: "as expeditiously as circumstances permit"; and that in our view would be a good rendering of the word. It is very difficult to say how the word 'forthwith' should be defined; but we think that the rendering of it by Jackson, J., is probably as good a one as there can be and that "as expeditiously as circumstances permit" is probably the correct definition of that word. Another rendering might be 'such time as appears to be reasonably early having regard to all the circumstances.' Obviously in some cases it might reasonably be held that the re-sale should take place immediately following on the abortive sale. For instance, take the case of a sale of ten lots of property where the first lot is put up for auction, the bid of a bidder is accepted but he then and there defaults in payment of the deposit. Under those circumstances probably it could quite reasonably be held that the property should be sold 'forthwith' meaning that it should be sold then and there before the sale of other nine lots is proceeded with; but it must depend entirely upon the circumstances of each case.

In this case we think that although it was not obligatory for a fresh proclamation of sale to be issued, yet it was in the

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interests of the auction-bidder that there should be a fresh proclamation for sale; that being so, there was no unnecessary delay, and in these circumstances the sale can be said to have been held 'forthwith'. The appeal must, therefore, be dismissed. No costs, as the respondent is unrepresented before us.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

The Secretary of State for India in Council represented by the Collector of Tanjore and others .. *Appellants** (*Defts.*)

v.

N. Gopala Aiyar and others .. *Respondents* (*Plffs.*).

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Land Acquisition Act (*I of* 1894), *Ss.* 4 *and* 6—*"Public purpose"—Provision of house-sites for Panchamas—Proviso to S.* 6 *not fulfilled—Objection before final declaration—Maintainability—Compensation "out of public revenue"—Payment of cost by grantees at a future date—Validity of declaration.*

Provision of house-sites for Panchamas is a 'public purpose' within S. 4 of the Land Acquisition Act. Even if only a section of the public is benefited, still the purpose is a public one.

The validity of a declaration under S. 6, Sub-S. (1) cannot be called in question before the declaration is in fact made. To find out if the requirement of the proviso to S. 6 has been fulfilled, the Court should have regard to the state of things at the time of the declaration. Its validity cannot be made to depend upon some future contingent event.

Where the Government proposed to acquire house-sites by advancing 80 per cent. of the cost in the first instance and recover the same from the grantees of the sites in the course of the next twenty years,

Held, the condition in the proviso to S. 6 (1) was fulfilled.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Appeal Suit No. 154 of 1924 preferred against the decree of the Court of the District Munsif of Valangiman in Original Suit No. 133 of 1923.

The Government Pleader for appellants.

The Advocate-General (*A. Krishnaswami Aiyar*) for respondents.

The Court delivered the following

JUDGMENT.—The first question that arises is "whether the purpose in question is a 'public purpose' within the meaning

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*S.A. No. 55 of 1926. 25th March, 1930.

of section 4 of the Land Acquisition Act (I of 1894) as altered by the Amending Act (XXXVIII of 1923). So far, only a preliminary notification has been published under that section and the further stage of making the declaration under section 6 has not yet reached. The plaintiff says that the purpose is not a public one and that is made a ground on which the suit for injunction is made to rest. The notification issued under section 4, after referring to G.O. No. 3559, dated the 10th of November, 1917, says, that whereas it is intended to acquire the plots belonging to the plaintiff for Manaikats for Panchamas and other coolies, he should intimate to the officer specified, his objection, if any, within a certain stated time. The alleged public purpose stated in this notification is the provision of house-sites for Panchamas (persons of low castes) and other workmen. The subject of providing the Panchamas of Tanjore with house sites was examined by the Madras Government. An officer was placed on special duty to go into the question. He points out in his report the urgent necessity that exists for the Government providing Panchamas and other servants with houses. He describes the conditions in the district and shows that the houses in which the farm servants live are claimed by the landholders as their own, although the servants have been living in them for generations. He mentions that the disputes are carried to law courts, where, after unequal contests, the labourers are defeated. He further points out that the landholders contrive that the farm servants are for ever at their mercy and prevent their acquiring houses. These employers (says the report) sometimes adopt curious methods; they borrow petty sums of money from their own servants, on the security of the sites in which the latter live, thus making Panchama mortgagees recognise the right of the landholders to the sites mortgaged. This report was generally endorsed by the Collector, accepted by the Board of Revenue and ultimately by the Government. The Government thereupon passed the G.O. referred to above, which runs thus:

"The Government have considered the proposals of M.R.Ry. K. S. Srinivasa Achariar regarding the provision of house-sites and land for the Panchamas of the Tanjore District and accept his recommendation that an endeavour should be made to secure to them, as well as to other labourers, the ownership of the sites in which they live. They agree with the Deputy Collector that the most satisfactory method of attaining the object will be to acquire the sites under the Land Acquisition Act and to hand them over to the applicants on payment. The opportunity should also be taken to provide pathways to 'cheries' which may be surrounded by cultivation."

"*Paragraph* 32 (6).—The Government approve as a provisional measure the suggestion that applicants for sites should pay an initial

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deposit of 20 per cent. of the cost of acquisition and that the payment of the balance of the cost price of the site may be spread over a period of twenty years, recovery being effected in half-yearly or yearly instalments according to the convenience of the grantees. The rate of interest should be 7 per cent."

The question then is, is this a public purpose or not? The Government in order to remove the disabilities under which the depressed classes labour has undertaken to provide them with house-sites. The condition of the Panchamas calls for its intervention. The measures adopted, while directly benefiting the Panchamas, indirectly benefit the public at large. Even if only a section of the public is benefited, still the purpose is a public one. The expression includes a purpose in which the general interests of the community, as opposed to the particular interests of the individuals, is directly and vitally concerned. (See *Hamabai Framjee v. Secretary of State for India*.[1]) If the purpose in question is not a public purpose, I fail to see what can possibly answer that description.

On behalf of the plaintiff, it is contended that the effect of the Government order is to enable it to acquire a particular house site for a particular individual. As the learned District Munsif has very clearly pointed out, this is a matter of detail, which does not affect the general question of the purpose being a public one. What the Government proposes is, to acquire the lands and once they are acquired, it may allot them in such manner as it pleases. But it is obviously the most sensible and convenient course to allot to each servant that particular house which he has been occupying. How this renders the purpose any the less a public one, I am unable to follow. The view taken by the Subordinate Judge is untenable and must be rejected.

The next question that arises is, whether the proviso to section 6 (1) is fulfilled or not. It says that no declaration under that section shall be made unless *inter alia* the compensation to be awarded is to be paid wholly or partly out of public revenues. It seems to me in the first place that it is premature to raise this question. As I have said the proceedings have not gone further than the issue of the preliminary notification. The difference between section 4 and section 6 is that whereas the former section refers to land in a particular locality, the latter contemplates a particular land; and again, whereas under section 4, it must only appear to the Government that land is needed or likely to be needed for a public purpose, under

1. (1914) I.L.R. 39 B. 279.

section 6 it must be finally satisfied, that it is so needed. It is only when the second stage referred to in section 6 is reached, that the Government is to make a declaration as provided in that section. That declaration when made, the section goes on to enact, shall be conclusive evidence that the land is needed for a public purpose. The section further prescribes that no such declaration shall be made unless *inter alia* the compensation to be awarded is to be paid wholly or partly out of public revenues. It is the final declaration that can be called in question if this condition is not fulfilled. What the Government has so far done is, to merely outline its present intention in this respect. There is nothing to prevent it from changing its mind, and the point of time that matters is, the date of the declaration and not any earlier date. It has now notified that it proposes to advance out of public funds, 80 per cent. of the price, to be recovered in instalments in a period of 20 years. Having regard to the design of the Act, this must be deemed to be but a tentative proposal, which may or may not be adhered to, at the time when the final declaration is made. The decisions have held that it is open to a party to question the propriety of such a declaration, on the ground that the condition in question has not been satisfied. That right, therefore, a party may exercise after the declaration has actually been made. Thus, the suit is premature, in so far as it seems to question the propriety of the Government's action, on the ground that it offends against the proviso to section 6.

In any case, I am prepared to hold that the facts of this case bring it within the proviso. Only 20 per cent. of the cost is furnished by the future owners and the remaining 80 per cent. the Government provides in the first instance. Mr. Justice Sundaram Chetty in a case bearing on this very notification has held that the requirement of the proviso has been fulfilled. (See *Secretary of State* v. *Murugesam.*[2]) My reason for agreeing with his view is this. The validity of the declaration under section 6 cannot be made to depend upon some future contingent event. Supposing that, at the time of the declaration, the entire cost was met out of public funds, but ten years later, it was recovered from the party to whom the land was transferred, are the proceedings on that account to be held invalid? Again let us suppose, that initially the cost is wholly borne by the party himself, can it be held that the declaration is valid because, on a later date, the Government means to pay back the amount

2. A.I.R. 1930 M. 248.

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to the party? In each case, the answer is obviously in the negative. These considerations dispose me to the view, that what the Court in construing the proviso must have regard to is, the state of things at the time of the declaration. A contrary view is bound to lead to inconvenient and absurd results. Though the wording of the proviso is unfortunately not explicit, the Courts must construe it reasonably. It is suggested for the Government that there is the possibility of its not recovering the 80 per cent. either wholly or in part. In my opinion, this is a factor that does not count. The section says that some portion of the cost must be paid out of the public revenue. That condition is here literally complied with. That is all with which the Court is concerned. On this point also, the view of the learned District Munsif is right and that of the Lower Court wrong.

In the result, the second appeal is allowed and the suit is dismissed with costs throughout.

S.R. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

Muthu Reddi and another .. *Petitioners in both** *(Petitioners).*

Muthu Reddi, *In re.*

Indian Extradition Act (XV of 1903)—"Foreign State"—East Indian possessions of France—Procedure in extradition proceedings—Treaty of 1815, Art. 9—British subjects charged with theft in Pondicherry—Requisition by Governor of Pondicherry for extradition—Summary order for surrender.

The East Indian possessions of France are not a "Foreign State" as defined in the Indian Extradition Act, 1903. The procedure to be observed in extradition proceedings between the British Indian Government and the authorities in the French Settlements in India is that prescribed by Art. 9 of the Treaty of 1815 between Great Britain and France, the legislative sanction for which has been provided by S. 18 of the Extradition Act.

Art. 9 of the Treaty of 1815 having provided for surrender on demand, a more elaborate procedure cannot be superimposed by the unilateral act of one of the High Contracting Parties. Nor is it open to a Municipal Court to say that the accused should in such cases be surrendered with a certain procedure.

Where criminal proceedings were instituted in Pondicherry against two British subjects for the offence of theft committed therein and the Governor of Pondicherry applied to a District Magistrate in British India for their extradition,

*Cr. Rev. Case No. 78 of 1930, Cr. Rev. P. No. 73 of 1930 and Cr. M.P. No. 133 of 1930. — 14th March, 1930.

Muthu Reddi, *In re.*

Held, that the Magistrate was bound to arrest the persons proceeded against and hand them over to the French authorities without further enquiry.

Rahamat Ali v. *Emperor*, (1919) I.L.R. 47 Cal. 37, followed.

In re *Celeste Cullington*, (1920) I.L.R. 48 C. 328, explained.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Magistrate of South Arcot, dated 4th January, 1930, and made in R.O.C. No. 12427 of 1929-C-1.

K. S. Jayarama Aiyar, K. S. Sankara Aiyar and *K. R. R. Sastri* for petitioners.

The Advocate-General (A. Krishnaswami Aiyar) and *The Public Prosecutor* for the Crown.

The Court made the following

Wallace, J.

ORDER. *Wallace, J.*—The point raised in this Criminal Revision Petition is of considerable importance, namely, what is the procedure to be observed in extradition proceedings between the British Government in India and the French Settlements in India.

The District Magistrate of South Arcot has, on a demand from the Governor of the French Settlement of Pondicherry and on information from him that judicial proceedings are pending in Pondicherry against two British subjects, arrested these two men and proposes to hand them over without further enquiry to the French authorities. The two arrested men have put in this petition alleging that the action of the District Magistrate is illegal, inasmuch as he has under the Extradition Act of 1903 no authority to deliver them up in this summary fashion, but must first hold an inquiry and satisfy himself that there is a *prima facie* case against them, as provided for in Chapter II of that Act. The learned Advocate-General on behalf of the Government contends that Chapter II of the Act has no bearing on the case, and that the case is governed by the provisions of and procedure indicated in Article 9 of the Treaty of 1815, the necessary legislative sanction for which has been provided by section 18 of the Extradition Act. The petitioners rejoin that section 18 has no application to cases where no procedure has been prescribed by the legislature, and that in any case its application is restricted to cases coming under Chapter III of the Act. They further urge that the extradition provision in the Treaty of 1815 had been abrogated by the Treaty of 1876

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and by the English Extradition Acts of 1870 and 1873. They argue further that any part of dependency of a Foreign State is for the purpose of the Indian Extradition Act a Foreign State to which Chapter II and not Chapter III will apply.

To take the last point first, a Foreign State is by definition in the Act a State to which the Extradition Acts of 1870 and 1873 apply. Whether or not a part or dependency of a Foreign State is itself a Foreign State need not be decided here, since I am of opinion that in any case the East Indian Dependencies of France were expressly excluded from the Extradition Treaty of 1876, and, therefore, they are not States or parts of a State to which the Extradition Acts of 1870 and 1873 apply. This is the view taken by a Bench of the Calcutta High Court in *Rahamat Ali* v. *Emperor.*[1] In a subsequent case in Calcutta, In re *Celeste Cullington*[2], a single Judge, Mr. Justice Buckland, differed, holding that Article 16 of the Treaty of 1876 does not exclude the East Indian Dependencies of France, but was intended to preserve the provision of the Treaty of 1815, and that the effect of the Order in Council of 16th May, 1878, was to put into operation as regards these Dependencies section 25 of the English Extradition Act, 1870. The learned Judge admitted that he had not then before him the exact terms of the Order in Council. That is a matter of regret since, if he had had these terms before him, I doubt, speaking with respect, if he would have differed from *Rahamat Ali* v. *Emperor.*[1] The concluding terms of the Order in Council are "that the Extradition Acts of 1870 and 1873 shall after 31st May, 1878, apply in the case of the said Treaty," that is, the Treaty of 1876 "with the President of the French Republic." So that it is only in respect of that Treaty and not in respect of all Treaties then in force that these Extradition Acts apply; and unless that Treaty abrogated the Treaty of 1815 in respect of French Dependencies in East India, the Extradition Acts of 1870 and 1873 do not apply to them, and they would, therefore, not be foreign States within the meaning of the Indian Extradition Act of 1903.

Article 16 of the Treaty of 1876 sets out "the manner of proceeding in the colonies and foreign possessions of the two High Contracting Parties," and ends up "the foregoing stipulations shall not in any way affect the arrangements established in the East Indian possessions of the two countries by the Article 9 of the Treaty of the 7th March, 1815."

1. (1919) I.L.R. 47 C. 37. 2. (1920) I.L.R. 48 C. 328.

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Now, as petitioners themselves argue, this Article 9 contains no *procedure,* strictly so called. Therefore, what the saving clause at the end preserves and intended to preserve, is the extradition "arrangements" provided by that Article. In other words that Article is in no way affected by. Art. 16 of the Treaty of 1876, and extradition in the East Indian Possessions of the two countries remains governed by the Treaty of 1815. This is the view which has been taken of this clause both in *Rahamat Ali* v. *Emperor*[1] and In re *Celeste Cullington.*[2]

The petitioners urge that, as Article 9 of the Treaty of 1815 provides no procedure, it is in effect unenforceable. This argument I do not follow. If that Treaty provided no procedure such as was provided by the prior Treaty of 1802 or by the subsequent Treaty of 1876, that is a clear indication that the High Contracting Parties did not agree upon or intend that there should be any formal procedure for extradition. I do not follow the argument that the Treaty cannot be brought into operation until the Legislature has provided and sanctioned a procedure. That would obviously be exceeding its province. The Legislature can only sanction a procedure if the Treaty provides for one. The procedure must be found or provided for in the Treaty itself before any Legislature of either party can legislate about it. The Legislature cannot alter either by addition or subtraction the essentials of a Treaty which is the contract between the High Contracting Parties or impose upon one party conditions which do not form part of that contract. That would be tantamount to the subjects of one High Contracting Party forcing on its own Government a breach of the Treaty, or making it impossible for its own Government to keep its pledged word with the other party. See *The Queen* v. *Wilson.*[3] Section 18 of the Indian Extradition Act lays down that nothing in this chapter, that is Chapter III, shall derogate from the provisions of any Treaty. That is, it incorporates in effect the provisions of such Treaty in the Municipal Courts of India. When, therefore, the Treaty says that offenders shall be extradited on demand, it is not open to a Municipal Court to say that they shall not be delivered up until some form of procedure initiated, prescribed and sanctioned by itself alone and not agreed upon by the High Contracting Parties is satisfied. There is, on this finding, no point here in emphasising that section 18 of the Extradition Act refers to Chapter III alone,

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1. (1919) I.L.R. 47 C. 37. 2. (1920) I.L.R. 48 C. 328.
3. (1878) 3 Q.B.D. 42.

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since, as already pointed out, the French Possessions in India are not a Foreign State, and, therefore, Chapter III is the only one which would apply to the present case.

Article 9 of the Treaty of 1815 which is, therefore, in my view the provision to be followed contemplates summary delivery at the request of any authority of either High Contracting Party. That is the view which the Local Government itself has taken of its obligations as set out in the Extradition Manual, Chapter III, section 2 (*a*), and I think we may assume that that is the view authorised by the High Contracting Party from whom this Government derives this authority. The procedure in the Manual, however, seems to be regarded as applicable to the case of "grave" offences, and neither side has been able to point us to any orders of Government under which the general provision of Article 9 of the Treaty of 1815 has been so restricted. This question, however, does not arise here as theft is a "grave" offence. I find, therefore, that there is no substance in this petition and it is dismissed.

The collateral petition (Cr. M.P. No. 133 of 1930) put in under section 491 of the Criminal Procedure Code must also fail since the detention of the petitioners is not illegal or improper; and it is also dismissed.

Jackson, J.

Jackson, J.—I agree.

Under the Indian Act (XV of 1903) a Foreign State means a State to which the English Extradition Acts of 1870 and 1873 apply. The main Act is that of 1870. (Vol. I, p. 443, Coll. Stat.) As provided in section 2 of that Act the application of that Act to any Foreign State shall be by Order in Council. If the Order in Council has not applied the Act to French Possessions in India, the Act does not apply and these Possessions are not a Foreign State as defined in the Indian Act (XV of 1903).

The Order in Council applied the Act not generally to France, but in a restricted sense "in the case of the Treaty with the President of the French Republic." This is the Treaty of 1876 which in terms does not affect the arrangements in the East Indian Possessions of the two countries (Art. 16). Therefore the Extradition Act of 1870 has not been applied to that part of France which is Pondicherry and Pondicherry is not a Foreign State.

Therefore, Chapter III of the Indian Act (XV of 1903), "Surrender in case of States other than Foreign States," applies

to Pondicherry. Section 18, falling within Chapter III, expressly preserves the provisions of any Treaty for the extradition of offenders, and its procedure. This makes the provision of the Treaty of 1815 applicable to the present case, and gives statutory sanction to its procedure. There is, therefore, no room for an argument that the Treaty cannot affect individual rights in the absence of statutory sanction.

Buckland, J., in In re *Celeste Cullington*,[2] says, "By an Order in Council, dated 16th May, 1878, the Extradition Acts were made applicable to France." It is here that with all respect I differ from him. I should have agreed, if the Order in Council stated "in the case of France" instead of "in the case of the said Treaty".

I agree that as the Treaty of 1815 practically provides for surrender on demand, a more elaborate procedure cannot be superimposed by the unilateral act of one of the parties.

B.V.V. *Revision Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Baba Jwala Das .. *Appellant**

v.

Pir Sant Das and others .. *Respondents.*

Admission—Statement relied upon as—Taking as whole of—Necessity—Hindu Law—Religious Endowment—Muth—Independent and separate muths—Mahant of one of—Succession by, to mahantship of other—Right of.

If a statement is to be relied upon as an admission the whole statement must be taken.

The Mahant of Muth Sainwal in an application made by him called the Sainwal Gadi "Gadi Sainwal Kotha Koh Kerana," Koh Kerana being another muth. In the same application, however, there was a definite assertion that Sainwal was a *Gadi*, and the person making the statement the *Gadinashin, Mahant.*

The High Court, translating "Kotha" in the application as "granary" or "treasury," regarded the statement as an admission by the Mahant of Sainwal that Sainwal was nothing more than a part of the institution of Koh Kerana.

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*P.C. Appeal No. 44 of 1929. 20th May, 1930.
Allahabad Appeal No. 32 of 1927.

2. (1920) I.L.R. 48 C. 328 at 335.

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Held, that the statement in the application must be taken as a whole, and that, if that was done, there was no such admission as that inferred by the High Court.

There is no rule precluding a mahant of an independent muth from claiming to succeed to the *Gadi* of another independent and separate muth.

Appeal No. 44 of 1929 from a decree of the High Court, Allahabad, dated the 19th April, 1927, which reversed a decree of the Subordinate Judge of Saharanpur, dated the 14th May, 1924, and decreed the plaintiff's suit with costs.

The material facts of the case are sufficiently fully set out in their Lordships' judgment.

Hyam for appellant.

De Gruyther, K.C. and *Wallach* for respondents.

Hyam for appellant.—The plaintiff must succeed on the strength of his own title. The custom alleged in the plaint was not established. Assuming the defendant is a trespasser, the plaintiff cannot dispossess him unless he proves a better right.

De Gruyther, K.C. and *Wallach* for respondents.—We have proved by the evidence on the record that the plaintiff No. 1 as the mahant of the parent gadi at Koh Kerana, was entitled to nominate a successor to the deceased Mahant. The plaintiff-respondent No. 2 was duly installed as mahant of the Jogiwara at Hardwar. The custom set up by us is consistent with the general custom and the law of succession obtaining among the sects of Jogishwars.

20th May, 1930. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The question in this appeal is as to the right to appoint a successor to one Kan Das, the *bairagi mahant* of a *muth* in Hardwar, who died in 1923 leaving no *chela* and having made no appointment to the *gadi.* On his death the appellant took possession of the *muth,* claiming to be entitled thereto as the *mahant* of a neighbouring institution at Sainwal from which he asserts the Hardwar *muth* was founded. The moveable property was locked up in a room by the police. The respondents then came forward with a rival claim as representing another *muth* at Koh Kerana. The matter was investigated by the Sub-divisional Magistrate, who held that the appellant had made out a *prima facie* title to the succession, but ordered the moveables to be kept under lock and seal for a further period of six weeks to enable the respondents to take

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proceedings in the Civil Court, failing which the property was to be made over to the appellant, who was left in possession of the immoveable property valued at between two and three lakhs of rupees. The respondents thereupon filed the suit out of which this appeal arises in the Court of the Subordinate Judge of Saharanpur claiming a declaration of their title to and possession of the *muth* and property, upon the allegation that the first respondent as the *mahant* of Koh Kerana had the right of appointment to Hardwar, and that he had appointed his own *chela*, the second respondent, as the successor of the deceased Kan Das.

It is admitted by counsel for the respondents that under these circumstances the burden was upon them to establish the right they claimed, and their Lordships have no doubt that this is so.

Reliance was placed in the plaint upon a deed of appointment, executed in the interval between the Magistrate's order above referred to and the institution of the suit, by which a number of persons describing themselves as "*mahants, santans* and *jogis*" purported to appoint the second respondent to the vacant *gadi* with the consent of the first respondent, but no reliance has been placed on this document before their Lordships. It seems, indeed, to be inconsistent with the contention to which the respondents now pin their faith, namely, that the right of appointment lies solely with the *mahant* of Koh Kerana.

It is common ground that the Hardwar *gadi* was established in or about the year 1818, and that the first *mahant* was one Ottam Das, to whom Kan Das was according to one account the third, and according to another the fourth successor. Ottam Das was the *chela* of Godha Das who was the *chela* of Pir Sukol, the then *mahant* of Koh Kerana, a *muth* which though itself the offshoot of another and older *muth* at Tila, was an institution of considerable antiquity.

In his preliminary examination by the Trial Judge, the second respondent admitted that if the *mahant* of a subordinate *gadi* dies without leaving a *chela*, the "*Sadar gadi*" (*i.e.*, the superior institution) has power to appoint a *mahant* to the subordinate *gadi* or to manage it himself. He also admitted that "if any other *gadi* sends its disciple and establishes an '*asthan*' (*i.e.*, an institution of this nature) at any place, and that disciple dies without leaving a disciple, the *mahant* who sent his disciple and established the *asthan* shall be entitled to

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manage that *asthan* or to appoint any person thereto.'' These statements were reaffirmed by the second respondent in his subsequent deposition before the Court.

It is clear, therefore, that what the respondents had to prove was that the Hardwar *muth* was the immediate offshoot of Koh Kerana, and the real question in the case is whether Godha Das, whose *chela* was the first *mahant* of Hardwar, was himself a *mahant* at Sainwal, and so intermediate between Koh Kerana and Hardwar.

The respondents alleged in their plaint, and it has been their case before this Board, that Sainwal is not a *gadi* at all but is merely a subordinate "*kotha*," *i.e.*, the granary, or possibly the treasury, of Koh Kerana. The Subordinate Judge, before whom the suit was tried, in a careful judgment, came to the conclusion that this was not established, and that there was no direct link of any kind between Koh Kerana and Hardwar. He held on the evidence that Ottam Das, the first *mahant* of Hardwar, was the *chela* of Godha Das, the *mahant* of Sainwal; that Hardwar always remained subordinate to Sainwal, and that the right of management of Hardwar, on the *mahant* of that institution dying without a *chela*, belonged to Sainwal. He accordingly dismissed the respondents' suit. On appeal the High Court came to the opposite conclusion and made a decree declaring the right of the second respondent to the management of the Hardwar property and ordering possession to be given to him.

After perusal of the evidence recorded their Lordships have no doubt that the respondents have failed to establish that Sainwal, from which it is clear that Hardwar was founded, was merely a *kotha* of Koh Kerana and, therefore, that the necessary link between that *muth* and the Hardwar *muth* is not made out.

It has hardly been disputed before the Board that Sainwal is now, at all events, a *muth* of which the appellant is the recognised *mahant*, and there appears to have been a regular succession in respect of the property there from Godha Das downwards. How this could be if Sainwal was merely the "*kotha*" —whatever may be the true implication of that term—of Koh Kerana, has not been explained.

As far back as 1864, long before the present dispute arose, Santok Das, the predecessor of Kan Das, in proceedings in the

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Criminal Court at Saharanpur referred to Ram Das the *guru* and predecessor of the appellant as the "Sajjadanashin of Sainwal" (a title admittedly equivalent to *gadinashin* or *mahant*), and gave his spiritual pedigree from Godha Das. In 1875, on the death of Shanker Das, of Koh Kerana, Ram Das describing himself as "Gadinashin of Kotha Sainwal," laid claim to the Koh Kerana *gadi*. His claim was dismissed, but from the judgment in the case, which is part of the present record, it does not appear to have been disputed that he was the then *de facto gadinashin* of Sainwal, and what is almost more suggestive still, the judgment refers to a similar claim which had been made by his *guru* and predecessor Pir Ganesh Das, "Gadinashin of Sainwal." In 1895 Ram Das instituted a suit against one Narotam Das in connection with the Sainwal property. In this suit he deposed to the history of the Sainwal *muth* as founded by Godha Das, and said that he had been on the Gadi for 50 years. There was no suggestion in his cross-examination that Sainwal was not a *muth* at all but merely part and parcel of Koh Kerana. The Koh Kerana *mahant* was not a party to this suit, but he can hardly have been ignorant of it if Ram Das was really only a subordinate official of his *muth*, and the deposition is put in evidence in the present suit by the respondents. This deposition, taken in conjunction with the 1875 judgment above referred to, makes it abundantly clear that Sainwal had at least claimed to be a *gadi* from the time of Ganesh Das some time prior to 1845 or 1846. No attempt seems to have been made by Koh Kerana to refute or even to dispute the pretences of Sainwal, or to assert what is now claimed on their behalf that Sainwal was not and never had been anything but an integral part of Koh Kerana, and this is the more remarkable in view of the obvious hostility between the two institutions.

Their Lordships do not think it necessary to go further into the documentary evidence in this case or to deal with the oral evidence which is, as might be expected, contradictory and of little real weight. It is sufficient to say that counsel for the respondents has been unable to point to any evidence of direct connection between Koh Kerana and Hardwar during the course of more than a century, whether by way of pecuniary assistance, selection or appointment of a *mahant*, or even consultation on the affairs of the *muth*.

The learned Judges of the High Court before whom the appeal came founded their judgment in favour of the respond-

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ents largely upon the fact that the appellant, in his application to the magistrate shortly after the death of Kan Das, calls the Sainwal Gadi "Gadi Sainwal Kotha Koh Kerana," and translating *"kotha"* as "granary" or "treasury," they regard this as an admission that Sainwal was nothing more than a part of the institution of Koh Kerana. They also rely upon the statement of Ram Das in the proceedings of 1895-6 in which he refers to "Kotha" Sainwal having been founded by Godha Das, as an "admission" by him to the same effect, and upon his description of himself as *"Baba"* Ram Das, instead of *"Mahant,"* which they say "has some significance." Their Lordships are not impressed by this reasoning. If a statement is to be relied upon as an admission the whole statement must be taken, and in each of the cases to which the learned Judges refer it is clear that there was a definite assertion that Sainwal was a *gadi,* and the person making the statement the *gadinashin,* which is admitted to be the equivalent of *mahant.* It may well have been that the building in which the Sainwal Gadi was originally established was a *"kotha"* of Koh Kerana, and that the title of the *gadi* had its origin in this. But if the burden of proving that Koh Kerana was the immediate founder of the Hardwar *muth* is upon the respondents, as it admittedly is, their Lordships cannot think that it has been discharged by inferences of this nature.

The learned Judges also held that "the very fact that Ram Das claimed to succeed to the *mahantship* of Koh Kerana goes to show" that he could not have been at that time the *mahant* of Sainwal, for "a *mahant* of an independent *muth* could not claim to succeed to the *gadi* of another independent and separate *muth.*" It is not stated upon what this dictum is founded, and no attempt has been made to support it before this Board. Nor, in their Lordships' opinion, could Sainwal be regarded as "independent" of Koh Kerana. It was founded from Koh Kerana by a *chela* of the Koh Kerana *mahant,* and was clearly, therefore, subordinate to it in the sense in which this term has been used throughout the case.

Their Lordships do not, however, desire to criticise the judgment of the High Court in detail. For the reasons already given they think that the respondents have failed to establish the right that they have claimed in this litigation and that their suit must be dismissed. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and that the decree of the High Court should be set aside and

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that of the Subordinate Judge restored. The plaintiff-respondents must pay the costs both in the High Court and before this Board.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD TOMLIN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

B. Raja Rajeswara Sethupathi, Raja of Ramnad, since deceased (now represented by R. Shunmuga Rajeswara Sethupathi) .. *Appellant**

v.

Mangalam and others .. *Respondents.*

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Madras Estates Land Act (I of 1908), Ss. 4, 27—Land allowed to lie fallow—Rent in respect of—Landlord's right to—Custom relieving tenant of rent—Effect—S. 73—Experimental harvesting of portion of field to find out yield—Landlord's right of—Judgment—Effect of—Decree actually passed—Reference to—Necessity—Privy Council—Decree under appeal terms of which not known with certainty—Variation of—Propriety—Finding of fact of first Appellate Court—Interference with—Jurisdiction—Second Appeal—Decree in—Appeal from.

Where there is a custom to relieve the tenant of rent in respect of land allowed to lie fallow, the custom is one of the conditions under which the ryot holds his land within the meaning of S. 27 of the Madras Estates Land Act, and the operation of S. 4 of the Act is restricted to the extent to which the tenant by the custom is relieved of his rent.

Where the landlord alleged that, in order to determine what was his proportion of the produce of a crop, he had a right to harvest himself a section of the field by way of experiment and to have provisions in regard to it inserted in the *puttah, held,* that the claim of the landlord to have inserted in the *puttah* any provision entitling him to make such an experimental harvesting as was suggested was contrary to the provisions of S. 73 of the Estates Land Act.

Without examining the decree actually passed the true effect of the decision in the case cannot be ascertained.

It is impossible for the Privy Council to vary a decree the contents of which have not been placed before it, and are not known with certainty.

In an appeal to the Privy Council from the decree in a second appeal, *held,* that the finding of fact of the first Appellate Court as to the existence of a custom was binding upon the Privy Council.

Consolidated Appeal No. 54 of 1926 against a judgment and several decrees, dated the 22nd December, 1915, of the High Court, Madras.

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*P.C. Appeal No. 54 of 1926. 30th May, 1930.

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The facts of the case are fully set out in their Lordships' judgment.

De Gruyther, K.C. and *Narasimham* for appellant.

Subbarow for respondents.

30th May, 1930. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—Their Lordships need not trouble the respondents' counsel.

This is an appeal which deals with the settlement of *puttahs* under the Madras Estates Land Act (I of 1908).

Before the subject-matter of the appeal is dealt with one preliminary observation can properly be made. This litigation has lasted from 1909 until the present time. Partly no doubt on this account the record has assumed substantial proportions. Their Lordships are indebted to Mr. De Gruyther for the lucid and concise way in which he has presented the case to them, thereby, in their Lordships' opinion, saving a great deal of public time.

Now, under the Act in question, where a difference arises between the landholder and the *ryot* as to the form which the *puttah* should take, procedure is provided by which the difference can be determined by the Collector. Sections 55, 56 and 57 of the Act contain the relevant provisions.

Section 55 relates to the case where the landholder fails to grant a *puttah* in such terms as the *ryot* is entitled to. There the *ryot* can sue for the proper *puttah* before the Collector.

Under section 56 when the ryot fails to accept the *puttah* tendered to him and to give a *muchilika* in exchange, the landholder may sue before the Collector to enforce the acceptance of such *puttah*.

Section 57 provides as follows:—

"In adjudicating suits under sections 55 and 56, the Collector shall first inquire whether the party sued is bound to grant or accept a *puttah*, and, unless this be proved, the suit shall be dismissed. If the plaintiff establishes that the party sued is bound to grant or accept a *puttah*, the Collector shall inquire whether the *puttah* demanded or tendered is a proper one. If it is found to be so, the Collector shall pass a decree directing the defendant to grant the *puttah* in exchange for a *muchilika* or accept the *puttah* and give *muchilika* in exchange. If the Collector is of opinion that the *puttah* demanded or tendered is not a proper one, he shall decide what the terms of the *puttah* should be, and shall embody such terms in his decree which shall be of the same force and effect as if a *puttah* and *muchilika* had been exchanged."

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Under the procedure of the sections referred to these proceedings were launched. They came before the Special Deputy Collector. From him they passed to the District Judge. From the District Judge they proceeded to the High Court. Ultimately they are here before His Majesty in Council.

Now, six points have been placed before their Lordships by Mr. De Gruyther on behalf of the landholder as matters in respect of which he desires to complain of the conclusion reached by the High Court.

The first point is one which deals with the rent which the tenant has to pay in the case where he omits to cultivate some part of the land, that is, leaves it to lie fallow. Upon the *puttah* as actually framed in accordance with the conclusions of the Court below, the tenant is excused rent if the land is allowed to lie fallow.

The point turns upon the construction of sections 4 and 27 of the Act.

Section 4 of the Act is in these terms:

"Subject to the provisions of this Act, a landholder is entitled to collect rent in respect of all ryoti land in the occupation of a ryot."

Section 27 provides:

"If a question arises as to the amount of rent payable by a ryot or the conditions under which he holds in any revenue year, he shall be presumed, until the contrary is shown, to hold at the same rate and under the same conditions as in the last preceding revenue year."

In India it has been held that where there is a custom by which the tenant is relieved of rent in the case of land allowed to lie fallow, the custom is one of the conditions under which the tenant holds within the meaning of section 27, and that section 4, which entitles the landholder to collect rent in respect of all *ryoti* lands, is restricted in its operation by the existence of such a custom.

The District Judge in the present case has held that there was a custom to relieve the tenant of rent in respect of land allowed to lie fallow. Their Lordships are bound by the finding of fact of the District Judge as regards the existence of the custom.

In their Lordships' view, the custom is one of the conditions under which the ryot holds his land within the meaning of section 27 of the Act, and the operation of section 4 is restricted to the extent to which the tenant by the custom is relieved of his rent. Their Lordships are, therefore, of opinion that

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there is no ground upon which the decision of the Courts below on this point can be interfered with.

The second point arises in this way: The land, the subject of the tenure, falls into two categories known as dry land and wet land, respectively. The rent fixed for wet land is a proportion of the produce paid in kind. The rent in respect of dry land is a rate paid in cash proportionate to the yield of the first and second crops. There are cases where wet land may be cultivated for dry crops, either because the water in the tank is not available or possibly at the caprice of the tenant, and the question is what rate the tenant should pay by way of rent in respect of any wet land which he cultivates dry.

Now, the Collector held that

"In adverse seasons, when a dry crop is raised for want of sufficient supply in the tank, the charge of *sara sari* will be improper and only *varam* is then payable as wet land pays rent in kind."

Their Lordships understand this to mean that where some part of the wet land is cultivated dry by reason of insufficiency of water, it would be improper to charge for that portion which is cultivated dry a rent based on the value of the share of average produce attributable to the landholder arising from the land cultivated wet; and that the proper rent payable in those circumstances is the landholder's proportion in kind of the actual crop raised.

When the matter came before the District Judge he said this (page 134 of the record):—

"It is objected before me that the tenants never raised the contention that dry crops should be specially treated if the water supply was insufficient. The Deputy Collector in his judgment himself states that the plaintiffs' pleader did not object to paying *sara sari* for dry crops on *nanja* land." [That is wet land.] "I must uphold the contention of the appellant that in these circumstances it was not open to the Deputy Collector to decree any special rate when there was an insufficiency of water in the tank. *Sara sari* will, therefore, be allowed to be levied whenever dry crops are raised on *nanja* land without permission."

That is to say, his conclusion is that the tenant raising by reason of insufficiency of water dry crops on wet land has got to pay in cash the value of the landholder's proportion of the produce based upon the average production of the wet lands.

Then on page 159 of the record there is to be found the High Court's conclusion upon this matter:—

"It is difficult to see on what principle the tenant should pay 'wet *sara sari*' if, owing to want of water in the tank, he is unable to raise a wet crop. The effect of the District Judge's judgment will be to compel the tenant either to leave the land waste when there is insufficiency of

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water or to penalise him if he raises a dry crop as the only possible means of raising something on the land. It stands to reason that if a tenant, having water in the tank and, therefore, means of raising a wet crop, chooses to raise a dry crop, this should not affect the right of the landlord to charge wet rates but where, owing to want of water, a wet crop could not be raised, there is no reason why the landlord should still be entitled to charge wet *sara sari* rates. We vary the decree of the District Judge by declaring that plaintiffs will be liable to pay *sara sari* wet rates if they raise dry crops while they could have raised wet crops and do pay the usual dry rates if they raised dry crops owing to insufficiency of water."

Now, it is said that the effect of that is not to restore the Special Deputy Collector's judgment, but to introduce a variation and to make the tenant where water is insufficient liable to pay for dry crops raised on wet lands only some rate in cash which has reference to the rates paid on dry lands. Without examining the decree actually passed the true effect of the decision cannot be ascertained.

The only decree of the High Court, printed in the record, does not deal with the point; as there were several suits, the matter may have been dealt with in some other decree, but their Lordships remain uninformed as to its contents. The appellant has failed to print it in his record or place it before the Board, and it is impossible for this Board to vary a decree the contents of which have not been placed before it, and are not known with certainty.

In these circumstances, in their Lordships' opinion, the appeal on this point must fail.

The third point is this: Apparently, it is the practice sometimes of landholders, in order to determine what is their proportion of the produce of a crop to harvest themselves a section of the field by way of experiment, and then to require the tenant to hand over produce in regard to the whole field upon the basis of what the yield of the particular section harvested by the landholder has been.

In this case the landholder claimed that that was a right which he had, and that provisions in regard to it ought to be inserted in the *puttah*. The Collector and the District Judge both refused to insert it, and the High Court at page 154 of the record said this:—

"It is difficult to see what right the landlord has under the Act to enter upon the land of the tenant for the purpose of making what has been described by Mr. Srinivasa Aiyangar as an experimental harvest. The object seems to be to arrive at an arbitrary figure by harvesting a small portion of the crops and to throw upon the tenant the burden of showing that the actual crop was not equal to the experimental harvest. We are of opinion that such a right is clearly opposed to the provisions of section 73

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of the Act and that both the Lower Courts were right in disallowing this claim."

Now, section 73 of the Act provides that:—

"(1) Where rent is taken by appraisement of the standing crop, the *ryot* shall be entitled to the exclusive possession of the crop. (2) Where rent is taken by division of the produce, the *ryot* shall be entitled to the exclusive possession of the whole produce until it is divided, but shall not be entitled to remove any portion of the produce from the threshing-floor at such a time or in such a manner as to prevent the due division thereof at the proper time. (3) In either case, the *ryot* shall be entitled to cut and harvest the produce in due course of husbandry without any interference on the part of the landholder. But before commencing to cut or gather the crop the *ryot* shall give reasonable intimation to the landholder or his authorized agent of his intention to do so."

In their Lordships' judgment the claim of the landlord to have inserted in the *puttah* any provision entitling him to make such an experimental harvesting as is suggested is contrary to the provisions of the section which has been read. The appeal on this head fails.

The next question relates to the tax or rent to be paid by the tenant to the landholder in respect of palmyra trees. The Collector and the District Judge have arrived at certain findings of fact in regard to palmyra trees, and they are these: That in two villages certain trees have been subjected to rent or tax, namely, 102 trees in one village, and 2 in another, but apart from those trees in those two villages, there has been no rent or tax paid in respect of any palmyra tree.

Section 12 of the Act provides that:—

"Subject to any rights which by custom or by contract in writing executed by any ryot before the passing of this Act are reserved to the landholder, every occupancy *ryot* shall have the right to use, enjoy and cut down all trees now in his holding, and in the case of trees which after the passing of this Act may be planted by the *ryot* or which may naturally grow upon the holding, he shall have the right to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary."

Now, having regard to that section, it appears to their Lordships plain that the tenant is entitled to the trees unless in case of trees planted before the passing of the Act there is established any custom or contract in writing which limits his right. The finding of the District Judge, by which this Board is bound, is in effect that there is no custom or contract in writing for payment of rent or tax on palmyra trees except in so far as there has been a custom to pay rent or tax upon specific trees, namely, the 102 trees in one village and the 2 trees in another. In these circumstances, the appeal from that conclu-

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sion which has been affirmed by the High Court is, in their Lordships' opinion, hopeless.

Then the fifth point relates to temple service. The claim of the landholder is that certain temple service has been rendered from time to time by the tenants, and that they have rendered it as a condition of their tenure. The Collector and the District Judge have found that in fact, although service has been rendered from time to time by tenants, it is not proved that that service was rendered as a condition of their tenure, the evidence being consistent with that service having been rendered as voluntary service. This finding is conclusive.

In these circumstances, in their Lordships' opinion, the appeal on this point also fails.

The last point is upon the form of the decree. It arises in this way: the tenants sometimes cultivate part of the bed of the tanks where the tanks have in part run dry. The High Court has in its judgment at page 158 of the record said this: "We are of opinion that the plaintiff is bound to pay *sara sari* if he should put up ridges and cultivate *kulamkorvai* lands"—that is lands in the beds of tanks.

Now, that is a decision in favour of the landholder. Against that the landholder naturally does not appeal, and there is no appeal on the part of the tenant; but the landholder says that when you turn to the actual decree, you find a divergence between the language of the decree and the language of the judgment. The language of the decree is to be found at page 161 of the record, and it is in these terms:—

"that for clause 4 in the Lower Appellate Court's decree, the following clause, namely, 'that the tenants are liable to pay *sara sari,* if they should put up ridges and cultivate *kulamkorvai* lands with the aid of either rain water or tank water' be inserted therein."

It will be observed that the words "with the aid of either rain water or tank water" are words which do not appear in the judgment and it is said that they in some way alter the sense, and that the decree diverges from the judgment.

In their Lordships' opinion, in the absence of any light as to what is the effect of those added words, it is impossible for them to come to the conclusion that the decree is in any way erroneous. But they do not intend by saying that to preclude the appellant, if so advised, from making any application which may be open to him in India to have the decree corrected if, in fact, there is any error in the decree, having regard to the terms of the judgment.

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The appeal on this point, therefore, must also fail so far as this Board is concerned.

The result is that the appeal fails on all points, and must be dismissed with costs to the 15th respondent, who alone appeared, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman, Walker & Shephard.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR LANCELOT SANDERSON.

John Agabeg Vertannes .. *Appellant**

v.

James Golder Robinson and others .. *Respondents.*

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Civil Procedure Code (V of 1908), S. 11—Title to land—Estoppel under S. 116, Evidence Act—Decree declaring A's *title to land as against* B *based on—Expiry of lease—*B's *suit for declaration of title to same land as against* A *after—Maintainability.*

The appellant was one of the four children of one *S. V.*, who had died intestate. In an ejectment suit the first respondent sought to obtain a decree of ejectment against the appellant, the widow of *S.V.*, and the three other children of *S.V.* The 1st respondent, whose title to the suit land was derived under a conveyance to him by the widow (and executrix) of *S.V.*, had granted a lease to the appellant of the said land, upon which he and the other defendants were residing. That suit went up on appeal to the Privy Council. The Board was of opinion that the conveyance by the widow operated to pass to the 1st respondent only her interest as widow in the said land, and not the beneficial interests of the children, but that the appellant was estopped, under S. 116 of the Evidence Act, from denying the title of the 1st respondent as regards his (appellant's) own share of the suit land. The Board accordingly passed a decree declaring that the 1st respondent was entitled to a quarter of two-thirds (or a one-sixth share) of the land sued for.

The appellant sued subsequently to obtain a decision that the one-sixth share so declared by the Board to be the property of the 1st respondent was his (appellant's) property, not by any title acquired by him subsequently to the date of the Board's decision, but by virtue of a title existing in him as one of the children of the intestate. He claimed that the estoppel under S. 116, which prevented him from asserting his title in the ejectment action, was temporary only, and ceased to operate when he gave up possession of the land and when his tenancy accordingly came to an end. He

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*P.C. Appeal No. 48 of 1929. 21st March, 1930.

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claimed that being no longer estopped under S. 116, he was entitled to assert and obtain a declaration of his ownership, and that the matter was not *res judicata.*

Held, overruling the appellant's contention, that the subsequent suit was barred under S. 11, Civil Procedure Code, because the judgment of the Board in the prior suit had, in clear and unambiguous language, determined finally and conclusively the ownership of the share claimed by the appellant in the subsequent suit.

Appeal No. 48 of 1929 from the decree of the High Court, Rangoon, dated the 19th June, 1928, affirming a decree of the District Court of Insein, dated the 8th March, 1928.

The material facts of the case are set out in their Lordships' present judgment and in the previous judgment of the Board, delivered on the 31st March, 1927, and reported in *Vertannes* v. *Robinson.*[1]

After the Board's judgment in the previous suit, the present appellant Vertannes made an application to the Judicial Committee for the addition to their judgment of some words to make it clear that the Board was only deciding that the then plaintiff, Robinson, as landlord was entitled to eject J. A. Vertannes as tenant and were not deciding that he (Vertannes) was not at the date of the application entitled to assert his title as one of the next of kin of his father to recover his share from the then plaintiff (Robinson). The Judicial Committee on the 1st July, 1927, dismissed this application giving thereon the following judgment (delivered by Lord Phillimore) :—

"One of the issues to be determined in this case was: Are the defendants or any of them estopped from disputing the plaintiff's title by the provisions of sections 115 and 116 of the Evidence Act. Their Lordships thought it unnecessary to decide whether the present petitioner was estopped under section 115 because they thought he was estopped under section 116."

"It is now submitted that he was only partially or temporarily estopped by virtue of the language of the section. That amounts really to an argument of bad grammar. The section is perfectly clear. Their Lordships are going to omit the immaterial words of the section: No tenant of immoveable property shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immoveable property. Now what is he not to be permitted to deny? That the landlord had at the beginning of the tenancy a title to such immoveable property. When is he not permitted to deny? During the continuance of the tenancy. It so happens that during the continuance of the tenancy this litigation arose and was brought to hearing and a decision. During that time the tenant, as he had not given up the property, could not deny the landlord's title . . . . could not deny that the landlord had a title when he made him his tenant. He could have denied the landlord had kept the title; he could not deny that he did not, and as this point happened to arise during the continuance of

1. (1927) L.R. 54 I.A. 276: I.L.R. 5 R. 427: 53 M.L.J. 71 (P.C.).

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the tenancy it had to be decided in one way and one way only, namely, that the landlord had the title because the man who was trying to dispute it could not deny that he had."

In the course of his judgment in the present appeal, Mr. Justice Das in the High Court, Rangoon, observed as follows:—

"It is argued before us that the plaintiff was not absolutely concluded by the judgment of their Lordships of the Privy Council in the other suit and that the plaintiff could file a suit on his title after the tenancy between him and Robinson had terminated. . . . Their Lordships did not use any words limiting the estoppel in any way. If they had meant that the plaintiff could file another suit after the termination of the tenancy they would surely have used the words to that effect, and it seems to us that the tenant is concluded for ever from filing a suit on his title if the suit is filed during the continuance of the tenancy. . . . If their Lordships had intended to leave it open to the 1st defendant in that suit to file another suit after the termination of the tenancy, they would simply have passed a decree for ejectment against him and not passed a decree declaring that the plaintiff in that suit was entitled to the share of the present plaintiff and would not have given liberty to the parties in that suit to apply for partition. There can be no doubt that their Lordships intended to and did decide finally on the rights of the parties to that suit in that land. It will be absurd to hold that their Lordships intended to allow one of the parties in that suit to file another suit on his title after having finally declared that the plaintiff in that suit was entitled to his share of the property."

Dunne, K. C. and *Raikes, K.C.* for appellant.

H. G. Vaisey, K.C. and *A. Pennell* for 1st respondent (Robinson).

Dunne, K.C. for appellant.—In the previous suit the title of the present appellant, Vertannes, was not directly in issue, and he is not precluded by the rule of *res judicata* from asserting title after he has ceased to be tenant and given up possession of the property. The rule is well established that as soon as a tenant surrenders possession, he can question the landlord's title (*Bilas Kunwar* v. *Desraj Ranjit Singh*[2]).

Vaisey, K.C. for respondent (Robinson).—Section 11 of the Civil Procedure Code operates as a bar to the present suit. The previous judgment of the Board clearly declares that the then plaintiff Robinson was "entitled" to the share of J. A. Vertannes. Your Lordships cannot now go beyond that declaration.

During the course of the argument, the following decisions were cited at the Bar:—

Bilas Kunwar v. *Desraj Ranjit Singh*,[2] *Vasudev Daji* v. *Babaji Ranu*,[3] *Bhaiganta Bewa* v. *Himmat Bidyakar*,[4] per Lord

2. (1915) L.R. 42 I.A. 202: I.L.R. 37 A. 557 at 567: 29 M.L.J. 335 (P.C.).
3. (1871) 8 Bom. H.C. (A.C.J.) 175.
4. (1916) 24 C.L.J. 103

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Blackburn in *Clark* v. *Adie*,[5] *Doe d. Knight* v. *Lady Smythe*,[6] *Watson* v. *Lane*,[7] *Doe d. Johnson* v. *Baytup*[8] and *Bayley* v. *Bradley*.[9]

21st March, 1930. Their Lordships' judgment was delivered by

Lord Russell.

Lord Russell of Killowen.—The matter under appeal before their Lordships is a decree, dated the 19th June, 1928, of the High Court of Judicature at Rangoon, affirming a decree of the District Court of Insein, dated the 8th March, 1928. The last-mentioned decree dismissed, on a preliminary issue, a suit brought by the appellant to establish against the first respondent his title as absolute owner to a quarter of two-thirds (or an undivided one-sixth share) in certain lands. The appellant claimed to be entitled to such share as one of the four children of Sarkies Vertannes who had died intestate as to the land on the 18th May, 1897.

The District Court dismissed the plaintiff's action on the ground that a judgment of this Board on appeal in a suit to which the present appellant and first respondent were parties, had finally dealt with the question of the ownership of the said share. The High Court affirmed this dismissal on the same grounds.

The said judgment of the Board was delivered on the occasion of an appeal in an ejectment suit in which the present first respondent (hereinafter called Robinson) sought as owner of the said land to obtain a decree of ejectment against the present appellant (hereinafter called Vertannes), the three other children and the widow of the said Sarkies Vertannes. Robinson, whose title to the land was derived under a conveyance to him by the widow (and executrix) of Sarkies Vertannes, had granted a lease to Vertannes of the said land, upon which he and the other defendants were residing.

The Board was of opinion that the conveyance by the widow operated to pass to Robinson only her interest as widow in one-third of the said land, and not the beneficial interests of the children. As regards the four children, Robinson contended that as against them his title was complete by estoppel under section 115 of the Evidence Act, and that in any event as

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5. (1877) 2 App. Cas. 423 at 435.
6. (1815) 105 E.R. 862: 4 M. & S. 347.
7. (1856) 11 Exch. 769.
8. (1835) 3 A. & E. 188.
9. (1848) 5 C.B. 396 at 400.

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regards the share of Vertannes, Vertannes being his tenant was estopped under section 116 of the Evidence Act.

The Board held that as regards the children, other than Vertannes, no case of estoppel under section 115 had been established; and that as regards Vertannes, he being clearly estopped under section 116, their Lordships were relieved from the necessity of considering whether he might also be held estopped under section 115. Their Lordships humbly recommended His Majesty that the judgments of the District Judge and of the High Court should be discharged and that in lieu thereof Robinson should have a decree for ejectment against Vertannes and the widow, and that it be declared that Robinson was entitled to one-third and one-quarter of the remaining two-thirds of the property in suit; and that the three children, other than Vertannes, were each entitled to one-quarter of the two-thirds, with liberty to Robinson or to any of the last-mentioned three children to apply for a partition.

Vertannes seeks by his present suit to obtain a decision that the one-quarter of two-thirds so declared by this Board to be the property of Robinson is the property of Vertannes, not by any title acquired by him subsequently to the date of the Board's decision, but by virtue of a title then existing in him as one of the children of the intestate. He claims that the estoppel under section 116, which prevented him from asserting his title in the ejectment action, was temporary only, and ceased to operate when he gave up possession of the land and when his tenancy accordingly came to an end. He claims that being no longer estopped under section 116, he is now entitled to assert and obtain a declaration of his ownership, and that the matter is not *res judicata*.

In view of the wording of the previous judgment of this Board in the ejectment action, their Lordships are unable to accede to these contentions. The language is clear and unambiguous, and according to its tenor the judgment of this Board purported to determine finally and conclusively the ownership of the share now claimed by Vertannes in the new action. Not only did the Board declare that share to belong to Robinson, but their Lordships classed it with the widow's one-third and made provision for partition of the entirety of the land among Robinson and the three children other than Vertannes.

In these circumstances, it is not open to Vertannes to seek to obtain in fresh proceedings a declaration of ownership of the share in question which would be inconsistent with the

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previous judgment of the Board in proceedings between the same parties.

While their Lordships think that the intention of the Board finally to determine the ownership of the share in question is clear from the language of the original judgment, this intention seems to be established beyond all doubt by subsequent proceedings before the same Board.

The judgment of the Board was delivered on the 31st March, 1927. Subsequently, Vertannes presented a petition alleging that he had, before the appeal had been heard, given vacant possession to Robinson, and asking to have the order on the appeal so framed as to make it clear that their Lordships were not deciding that Vertannes was not entitled to assert his title as one of the next of kin of his father against Robinson.

The Board heard this petition on the 1st July, 1927, and it was dismissed with costs. From the language used by Lord Phillimore in announcing the Board's decision on that occasion, their Lordships to-day are satisfied that the Board intended that the decision on the appeal should, as between Robinson and Vertannes, finally and conclusively determine the ownership of the one-quarter of two-thirds which is the subject-matter of the new suit. Indeed, it is difficult to imagine why, unless such was the Board's intention, no relief should have been granted on the petition.

Their Lordships feel themselves constrained, without expressing any views as to the construction or effect of section 116, to hold that the appellant is prevented by the judgment delivered on the 31st March, 1927, and the Order in Council made thereon, from obtaining the relief sought by him in the new action.

For these reasons their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Solicitors for appellant: *Bramall & Bramall.*

Solicitors for 1st respondent: *Waterhouse & Co.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Maharaja Bir Bikram Kishore Manikya Bahadur. *Appellant**

v.

Ali Ahamad .. *Respondent.*

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Maharaja Bir Bikram Kishore Manikya Bahadur *v.* Ali Ahamad.

Bengal Tenancy Act (VIII of 1885), *S.* 6 *(a)—Tenure held from before Permanent Settlement—Enhancement of rent of—Right of—Conditions—Proof of—*Onus *on landlord—Assessments occasional due to increase of area—Enhancement by reason of—Right of—Civil Procedure Code, S.* 100*—Permanent Settlement—Tenure existing before—Question as to—Fact or Law—Settlement Officer engaged in preparation of record of rights—Order of—Not evidence under Bengal Tenancy Act.*

The appellant was the owner of a Zemindary which consisted *inter alia* of a number of *taluks* and one *nij taluk* of the Zemindar, which was split up into a number of *tuppahs.* The *taluks* and *tuppahs* existed before the Permanent Settlement. In or about the year 1912 a survey of the estate was commenced, and a record of rights was prepared under the Bengal Tenancy Act. The entries in the record of rights described the said *taluks* and *tuppahs* as "rent liable to enhancement". After the publication of the final record of rights, the appellant instituted suits against the *talukdars* and *tuppahdars* under S. 105 of the Bengal Tenancy Act, ostensibly for the settlement of a fair and equitable rent in respect of the lands held by them, but in reality for enhancement of rent. The Courts below took into account the presumption in favour of the appellant arising out of the entry in the record of rights that the tenures were liable to enhancement, but nevertheless held, on the evidence in the case, that the appellant had failed to discharge the *onus* cast on him by S. 6 (*a*) of the Bengal Tenancy Act. The only circumstance relied upon by the appellant against the permanency of rent was that the *tuppahs* were assessed in 1824 and that both the *taluks* and *tuppahs* were assessed in 1847 for 30 years. It appeared, however, from the various reports of the Revenue Officers that the rent of the tenure was intended to have been fixed for ever, and that no fresh assessments would have been made but for the fact that neither the areas nor the boundaries had ever been fixed. The Courts below also found upon evidence that the increase, if any, was due to excess of area.

Held, that in view of the special circumstances of the case under which the assessments of 1824 and 1847 were made, and the statements of the Revenue Officers above referred to, the said assessments were insufficient to raise an inference in law that the appellant had proved the conditions enabling him to enhance the rent.

The order of the Settlement Officer is not evidence under the Bengal Tenancy Act.

The question whether the tenure existed before the Permanent Settlement is one of fact.

Consolidated Appeals No. 99 of 1927 from a judgment and 47 decrees of the High Court, Calcutta, dated the 7th

*P.C. Appeal No. 99 of 1927. 31st March, 1930.
Bengal Appeals Nos. 118—164 of 1923.

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August, 1923, confirming a judgment and 47 decrees of the Court of the Special Judge of Noakhali, dated the 17th September, 1919, affirming two judgments and 47 decrees passed by the Assistant Settlement Officer of Noakhali at Feni, dated the 16th October, 1917.

The principal points for determination on the present appeal were (1) whether the Taluks in question were independent, and (2) whether the plaintiff-appellant was entitled to enhance the rent payable by the respondents?

The material facts of the case are set out sufficiently fully in their Lordships' judgment.

De Gruyther, K.C., Parikh and *Pennell* for appellant.

Abdul Majid for respondent.

De Gruyther, K.C., for appellant.—The entries in the revenue papers that the rents were enhanceable, threw the *onus* of rebuttal on the respondents, the tenure-holders: S. 103 (*B*), Bengal Tenancy Act. The rent having been once altered since the Permanent Settlement, it is clear that it was never fixed in perpetuity: *Barmapada Roy* v. *Midnapore Zemindary Co.*[1] and Amir Ali's Bengal Tenancy Act (1904 Ed.), p. 78.

[*Lord Thankerton.*—Under section 6 the burden is on the Zemindar.]

[*Sir Binod Mitter.*—The question of the fulfilment of the conditions under section 6 is one mainly of fact.]

Referred to *Nurul Huq* v. *Maharaja Birendra Kishore*[2], a case relating to the same Zemindary, where a different conclusion was arrived at.

Counsel for the respondent was not called upon.

31st March, 1930. Their Lordships' judgment was delivered by

Sir Binod Mitter.

Sir Binod Mitter.—These are consolidated appeals from a judgment and 47 decrees, dated the 7th August, 1923, of the High Court of Judicature at Fort William in Bengal, affirming decrees of the Special Judge of Noakhali, dated the 17th September, 1919, which, in their turn, affirmed the decrees, dated the 16th October, 1917, of the Assistant Settlement Officer of Noakhali.

The *zemindary* with which these appeals are concerned is known as the four annas share of Pergana Dandra.

1. (1912) 16 C.L.J. 322.   2. (1922) 38 C.L.J. 121.

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In 1792 the *zemindar* of the four annas share was one Mahammud Ali, and by an Order, dated the 7th December of that year, he was imprisoned for life as a rebel and his *zemindary* was confiscated by the Government in February, 1793. It has been suggested before this Board that there was in reality no confiscation, but in the view that their Lordships take of this case the question is immaterial.

The *zemindary* consisted of 45 *taluks* belonging to different *talukdars* and one *nij taluk* of the *zemindar* which was split up into 35 *tuppahs,* and certain other lands.

It is not disputed that the *taluks* and *tuppahs* existed before the Permanent Settlement.

The Collector of Tipperah made *dowl* settlements with the *talukdars,* but neglected to record the extent of the land, nor were the boundaries ascertained.

Their Lordships set forth below a specimen form of such *dowl*:

"*Dowl* settlement of rent in money (in respect of) Taluk Mahomed Reza (?) (in the) possession of Faizullah, appertaining to 4 annas *Hissya* of *Pargana* Darra Mahomed Ali Chowdhury, Sarkar Sonargaon, Mahal Khalisa, etc., Zilla Rosana (torn), Tipperah, year 1199.

Description.	Total amount (*mokra*) in silver coin. Rs.	a.	g.	k.
Former (Gujasta Jama) deducting (penned through) Rs. 2-13-0	7	3	2	3
Collection expenses	1	12	18	3
	9	0	1	2
	(penned through)			

I will pay *sicca* rupees nine and *karas* six."

The Government collected the revenue or rent by farming out the *zemindary* for some years, but subsequently realised the dues from the owners of *tuppahs* and *taluks* directly. There is a dispute as to whether what was collected was revenue or rent.

The other 12 annas share of the *Pargana* was permanently settled on the 17th March, 1798, and was partitioned into four separate shares, two of which were subsequently sold for arrears of revenue in 1835, and were purchased by the Government.

Considerable difficulty, however, was experienced in the management of the estate because whenever a dispute arose, as the areas were not specified, confusion was created by the uncertainty whether any particular land was included in the 4 annas estate or the other two shares out of the 12 annas which had been purchased by the Government, or the remaining two shares.

Counsel for the appellant has drawn their Lordships' attention minutely to the various reports of the Revenue Officers, and it appears from them that they were of opinion that the rent of the tenures was intended to have been fixed for ever, and no fresh assessment would have been made, but for the fact that neither the areas nor the boundaries had ever been fixed.

The Revenue Officers were, however, of opinion that the Government was suffering loss by fraudulent encroachment on its own lands by the *talukdars* and *tuppahdars*, and to prevent such encroachment the Government decided to have the whole *Pargana* surveyed.

The *tuppahs* were assessed in 1824, and both the *tuppahs* and *taluks* were assessed in 1847 for a period of 30 years.

It appears that on the 28th May, 1845, the Commissioner passed an Order directing that the settlement should be for a term of 30 years, and that the rate of rent should not be enhanced on expiry of the term.

In 1847, as has already been stated, notwithstanding the protests of the *talukdars*, a settlement was made whereby the rate was fixed at Rs. 3-15-6 per *kani*, but there is no evidence as to what the rate of the rent of the *taluks* or *tuppahs* was before 1793, or whether any rate of rent was fixed in 1793.

In 1869 the 4 annas share *zemindary* was permanently settled with one Assima Banu, heir of Mahammud Ali, and Bharat Chandra Deb, who had purchased in the meantime the interests of the other heirs of Mahammud Ali. The present plaintiff's ancestor purchased the *zemindary* after it had been settled as aforesaid.

In or about the year 1912, on the application of the appellant, a survey of the estate was commenced, and a record of rights was prepared under the Bengal Tenancy Act. The Settlement Officer passed a general order with regard to the *taluks* and *tuppahs*, directing that in preparing the record of rights these tenures were to be described as "rent liable to enhance-

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ment". The actual entries in the record of rights finally published, in which it is alleged the words "rent liable to enhancement" occur, have not been exhibited in these appeals, but the order of the Settlement Officer is on the record. The order is not evidence under the Bengal Tenancy Act, but their Lordships will assume that there are such entries in the finally published records, as alleged by the appellant.

After the publication of the final record of rights the *zemindar* brought several suits against the *talukdars* and *tuppahdars* before the Assistant Settlement Officer under section 105 of the Bengal Tenancy Act, ostensibly for the settlement of a fair and equitable rent in respect of the lands held by them, but in reality for enhancement of rent.

After recording evidence, both *oral* and documentary, the Assistant Settlement Officer came to the conclusion: (1) That these tenures were originally independent *taluks* but had lost their character, and (2) that the tenures existed before the Permanent Settlement, and the appellant had failed to prove any local custom or the conditions of the tenure entitling him to enhance the rate of rent. He held that the appellant failed to discharge the onus cast on him by section 6 (*a*) of the Bengal Tenancy Act. He took into account the presumption in favour of the appellant arising out of the entry in the record of rights that the tenures were liable to enhancement.

There were appeals from his judgment and decree to the Special Judge of Noakhali. The Special Judge held—

(1) That the *taluks* existed before the Permanent Settlement, and

(2) That they were independent *taluks* within the meaning of the Bengal Regulations.

He further held as follows:—

"From 1848 till 1869 they paid uniform rents and previous to 1848, there having been no ascertainment of definite areas, it cannot properly be said that the rent of these *taluks* varied. If there was any increase it was for excess area. I, therefore, find that there is no good ground to assert that those *taluks* are on enhanceable rents and that the plaintiff has any right to demand any enhancement of rent under sections 6 and 7 of the Bengal Tenancy Act. The presumption of Khatyan is clearly rebutted."

The appellant appealed to the High Court.

The learned Judges by their judgment under appeal stated:

(1) "The question whether the landlord has succeeded in proving the necessary conditions is primarily a question of fact.

(2) "It should be observed that the Special Judge finds that if there was increase in any case it was for increase of area, and there are materials on the record from which such a conclusion may be drawn."

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They further held on the merits that the appellant had failed to prove that he was entitled to enhance the rent under the terms of section 6 of the Bengal Tenancy Act. They were also of opinion that these tenures were independent *taluks*.

Two questions have been argued before their Lordships:

(1) Whether the *taluks* and *tuppahs* were independent *taluks*.

(2) Whether the appellant succeeded in proving that under the conditions under which the tenures are held their rents are liable to enhancement.

In the view that their Lordships take of the second question they think it unnecessary to express any opinion on the first.

Section 6, clause (*a*) of the Bengal Tenancy Act is as follows:—

"Where a tenure has been held from the time of the Permanent Settlement its rent shall not be liable to enhancement except on proof.

(*a*) "That the landlord under whom it is held is entitled to enhance the rent thereof either by local custom or by the conditions under which the tenure is held."

No question of local custom has been raised.

There is no doubt that the tenures existed before the Permanent Settlement.

This is a question of fact and has been decided in favour of the tenants by all Courts in India.

The appellant has not argued, nor in the face of the findings could he argue, that by reason of what took place in 1847 a new tenure was created. This being so, the only question is whether the appellant has succeeded in proving that by the conditions under which the tenure is held he is entitled to enhance the rent. All that their Lordships have before them against the permanency of rent is that the *tuppahs* were assessed in 1824, and that both the *taluks* and *tuppahs* were assessed in 1847 for 30 years.

Having regard to the special circumstances of this case under which the assessments were made, and the statements of the Revenue Officers made from time to time that the rent of the tenures could not have been increased if the area or the boundary thereof had been fixed, their Lordships are unable to hold that these two assessments give rise to an inference in law that the appellant has proved the conditions enabling him to enhance the rent. There is ample evidence on the record that the areas of the lands occupied by the tenants had increased after 1793.

Their Lordships are of opinion that the questions involved in these appeals on which they are expressing their opinion are questions of fact.

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Their Lordships find that the Special Judge did take into consideration the presumption under section 103-*B* of the Bengal Tenancy Act. They are of opinion that the Special Judge had before him evidence proper for his consideration in support of his finding that the increase, if any, was due to excess of area.

Their Lordships are, therefore, of opinion that the appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Stanley Johnson & Allen.*

Solicitors for respondent: *Hardcastle Sanders & Co.*

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice,* MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

Polur Reddi .. *Petitioner* (Complainant)*

v.

Munusami Reddi and others .. *Respondents (Accused).*

F. B

Polur Reddi v. Munusami Reddi.

Criminal Procedure Code (V of 1898), S. 346 (1) and (2)—Transfer of case by Second Class Sub-Magistrate to Joint First Class Magistrate under cl. (1)—Case sent back by Joint Magistrate to Sub-Magistrate for disposal—Validity of later transfer.

A complaint was filed against the accused before a Second Class Sub-Magistrate for the offence of dacoity. The Sub-Magistrate, while holding that there was no basis for the charge, thought that the charge was one under S. 148, Indian Penal Code, namely, rioting armed with deadly weapons, and sent the case on under S. 346 (1), Criminal Procedure Code, to the Joint First Class Magistrate for disposal. The Joint Magistrate after going into the case differed from the view taken by the Sub-Magistrate. He thought that the accused might be guilty of some lesser offence and referred the case back to the Second Class Sub-Magistrate. Objection having been taken to the validity of the later transfer,

Held; that the Joint Magistrate had jurisdiction under S. 346 (2), Criminal Procedure Code, to transfer the case as he did.

In re *Kottur Hampanna,* (1922) I.L.R. 45 Mad. 846, considered.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Vellore, dated 25th June, 1929, and made in C.M.P. No. 61 of 1929 (C.C. No. 56 of 1929 on the file of the Joint Magistrate, Tirupattur).

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*Cr. Rev. Case No. 833 of 1929. 15th April, 1930.
Cr. Rev. P. No. 746 of 1929.

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Polur Reddi *v.* Munusami Reddi.

S. T. Srinivasagopalachari for *A. S. Sivakaminathan* for petitioner.

N. S. Mani for *The Public Prosecutor* on behalf of the Crown.

Respondents not represented.

The judgment of the Court was delivered by

Beasley, C. J

Beasley, C.J.—This case comes before us on a reference made by our learned brother Jackson, J.

The facts of the case are that a complaint was made against eight persons on a charge of dacoity and came before the Second Class Sub-Magistrate of Tirupattur. The Sub-Magistrate thought that there was no basis for that charge; but as of the eight persons accused before him one was alleged to have been armed with a stick and a deadly weapon, he thought that the charge was one under section 148 of the Indian Penal Code, namely, rioting armed with deadly weapons and accordingly sent the case on under section 346 (1) of the Criminal Procedure Code to the Joint First Class Magistrate for disposal. The Joint First Class Magistrate after going into the case differed from the view taken by the Second Class Sub-Magistrate and thought that the evidence disclosed that the accused might be guilty of some lesser offence. In dealing with the matter he pointed out that the fifth accused, who was the only accused stated to have been there armed with deadly weapons and having taken part in the riot, was merely a spectator and took no part whatever in the rioting, and dismissed the complaint against him. He referred the case back, under section 346 (2), Criminal Procedure Code, to the Second Class Magistrate on the 30th of May, 1929. The complainant in the case feeling aggrieved at this order preferred a revision petition to the District Magistrate and he dismissed it as he came to the conclusion that the case had been properly dealt with by the Joint Magistrate. Against this order the complainant presented a revision petition to the High Court. Jackson, J., before whom it came, whilst strongly holding the view that the Joint First Class Magistrate was acting within his jurisdiction when he referred the case back to the Second Class Sub-Magistrate, felt himself very much embarrassed by a decision in *In re Kottur Hampanna.*[1] This decision he took to be one holding that the question of jurisdiction is irrevocably fixed by the Lower Court

1. (1922) I.L.R. 45 M. 846.

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when it submits the case under section 346 (1) to the superior Magistrate. Section 346 (2) reads as follows:—

"The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial."

If our learned brother Jackson, J., is right in his interpretation of the judgment in In re *Kottur Hampanna*[1], then we are clearly of the view that that case was wrongly decided. But, first of all, we have got to see whether the interpretation placed upon that judgment by our learned brother is correct or not. He has taken the last paragraph of that judgment on page 848 to mean that the Magistrate therein referred to is the Magistrate who makes the submission under section 346 (1) and not the Magistrate who refers the case under section 346 (2). In that view of the judgment, that case does decide that it is the charge which the Magistrate who submits the case under section 346 (1) thinks is the right one that the Magistrate to whom he submits the case has to deal with and that charge alone. He has got to try it and dispose of it himself or commit the accused for trial. If that is the correct understanding of that judgment, then as before stated, we are clearly of the opinion that that judgment is wrong. Sub-section (2) to section 346 is perfectly clear, definite and wide and the Magistrate to whom the case is submitted has got to do three things. He has either got to try the case himself, or after having heard it to a certain point, refer it to any Magistrate subordinate to him who has got jurisdiction to try the case or to commit the accused for trial. We think that that is really what was meant in In re *Kottur Hampanna*,[1] and that the Magistrate therein referred to is the Magistrate making a reference under section 346 (2). Although the section alone is referred to and no sub-sections are referred to, we think, having regard to the facts of the case and the observations made at page 847, that the Magistrate to whom the case has been submitted was intended to be referred to. At page 847 it is stated as follows:

"It may be urged that the Sub-Magistrate, who sent up the case, was subordinate to the Sub-Divisional Magistrate and that his order was in effect a reference to him. If so, the reference should have been made explicitly and with some distinct indication of what action the Sub-Magistrate was to take, not with an obscure injunction, which could afford no real guidance."

What happened in that case was that the First Class Sub-Divisional Magistrate to whom the case had been submitted

1. (1922) I.L.R. 45 M. 846.

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by the Sub-Magistrate made an order as follows:

> "The Sub-Divisional Magistrate declines to transfer the case to the file of another Sub-Magistrate."

And then later on

> "As regards the section under which the offence, if proved, is likely to fall, the Sub-Magistrate is requested to study the commentary carefully under section 379 of the Indian Penal Code."

In the opinion of the Bench that was not the proper way to deal with the case submitted to him. Reference was made in that case to two unreported cases, *Queen-Empress* v. *Fakira*[2] and *Queen-Empress* v. *Purushottam*[3], as authority for the position that a superior Magistrate cannot simply return a case to the Subordinate Magistrate from whom it comes but must refer it to some other Magistrate or dispose of it himself. But these cases on examination do not seem to go to that length. If they do, we are clearly of the opinion that those cases were wrongly decided; because the terms of sub-section (2) to section 346 are quite clear and sufficiently wide to embrace a reference back of the case to the Magistrate who originally submitted it. In our view, therefore, there is no warrant for saying that the Magistrate who acted under section 346 (2) had no jurisdiction in this case so to act. The question argued before our learned brother Jackson, J., was merely the question of jurisdiction. No argument was addressed to him upon the merits. We have heard a brief argument upon the merits of the case and in view of the order of the Magistrate in which he states that the evidence points the fact that the fifth accused who is the only person alleged to have been present armed with deadly weapons was merely a spectator, we think that the view he took with regard to the offence possibly committed by the accused persons was correct. As soon as the fifth accused was eliminated from the charge, obviously no charge against the other accused persons of rioting armed with deadly weapons could possibly lie.

In view of the observations we have made, the petition must be dismissed.

B.V.V. *Petition dismissed.*

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2. (1890) Ratanlal's Unrep. Cases, p. 499.
3. (1891) Ratanlal's Unrep. Cases, p. 554.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Avasarala Venkatarama Row .. *Appellant** (*2nd Deft.*)

v.

The Maharaja of Pittapuram and another .. *Respondents* (*Plaintiff and 1st Defendant*).

Venkatarama Row *v.* Maharaja of Pittapuram

Madras Land Revenue Assessment Act (*I of* 1876), *Preamble and S.* 1—*Ownership by adverse possession—Whether amounts to an alienation—Application for separate registration.*

Where a zamindar brought a suit for declaration that the suit lands were entitled to be separately registered in the name of the owner under the provisions of the Madras Land Revenue Assessment Act, the question that arose was whether according to the preamble of the Act the wording "alienation by sale or otherwise" would include a case of ownership by adverse possession for the statutory period.

Held, that the Act (I of 1876) applied not only to cases of transfer *inter vivos* but also to cases where a person had become owner of property by virtue of adverse possession for the statutory period.

Pusarla Peda Brahmaji v. *Krishnamachariar*, (1919) 11 L.W. 389 and *Subba Rao* v. *Rajah of Pithapur*, (1926) 53 M.L.J. 400, followed.

All that the Act contemplates is that there should be a separation from the main estate of the land in question in such a way that the ownership of the land in question becomes vested in the other person as owner.

Second appeals against the decrees of the Court of the Subordinate Judge of Cocanada in A.S. No. 109 of 1924 and A.S. No. 94 of 1924 preferred against the decrees of the Court of the Additional District Munsif of Cocanada in O.S. No. 31 of 1923 and O.S. No. 16 of 1923 (O.S. No. 574 of 1920 and O.S. No. 547 of 1920, respectively, Principal District Munsif's Court, Cocanada).

C. Rama Rao for appellant.

The Advocate-General for respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit filed by the Maharaja of Pittapuram against the Secretary of State for India in Council as the 1st defendant, and Avasarala Venkatarama Row of Panduru as the 2nd defendant, for separate registration of the lands situated in the village of Panduru alleged to be within the zemindari of Pittapuram. Prior to the suit, the plaintiff applied to the Deputy Collector under the

*S.As. Nos. 821 and 823 of 1925. 4th April, 1930.

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provisions of Madras Act I of 1876 for such separate registration. The 2nd defendant having raised an objection, the Deputy Collector declined to order separate registration, with the result that the Maharaja of Pittapuram filed the suit from which this second appeal has arisen.

The main pleas raised by the 2nd defendant were (1) that there was no "alienation" in the present case within the meaning of Act I of 1876, and (2) that, on the merits, the plaintiff was not entitled to separate registration since these lands were not included within the assets of the zemindari at the time of the Permanent Settlement. Both the Lower Courts overruled the first contention raised by the 2nd defendant and held that, if on the merits the plaintiff proved that the suit lands were included within the assets of the zemindari, the plaintiff would be entitled to have separate registration as prayed for. On the merits the Trial Court found against the plaintiff and accordingly dismissed the suit. On the plaintiff's appeal, the learned Subordinate Judge held, for reasons given in paragraph 10 of his judgment, that the suit lands must be taken to have been included in the assets of the zemindari, and he passed a decree for separate registration as prayed by the plaintiff. This second appeal has accordingly been preferred by the 2nd defendant in the case.

On his behalf, his learned Advocate argued two points; one relating to the preliminary question whether Act I of 1876 applies to this case and the other to the merits. Taking the first question about the applicability of the provisions of Act I of 1876, it was argued for the appellant that the Act deals only with cases of lands "alienated by sale or otherwise". It being common ground that the Maharaja is not able to point out to any particular act of alienation *inter vivos* the finding of the Lower Appellate Court was that the 2nd defendant has acquired ownership of this property by virtue of adverse possession for over the statutory period. The learned Advocate argued that such a case could not be said to come within Act I of 1876. He argued that the words "alienation by sale or otherwise" imply cases of transfer *inter vivos*. On behalf of the respondent it was argued that the word "alienation" is wider than the word "transfer" and that all that the Act contemplates is that there should be a separation from the main estate of the land in question in such a way that the ownership of the land in question becomes vested in the other person as owner. We think that the contention raised by the respondent should be upheld. It must be noticed that the wording in question occurs

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in an Act passed as early as 1876, and that the exact question that we are now called upon to decide has come before this Court, at least twice, as reported cases show. In *Pusarla Peda Brahmaji* v. *Krishnamachariar*[1] Oldfield and Krishnan, JJ., decided this very point against the contention raised by the appellant before us. Later on, in the case reported in *Subba Rao* v. *Rajah of Pithapur*,[2] the same question arose before Waller and Madhavan Nair, JJ., and the learned Judges, as we understand their judgment, followed the decision in *Pusarla Peda Brahmaji* v. *Krishnamachariar*[1] and were not prepared to have the question re-opened. If the learned Judges in *Subba Rao* v. *Rajah of Pithapur*[2] doubted the correctness of the decision in *Pusarla Peda Brahmaji* v. *Krishnamachariar*[1] they would not have sent the case back for enquiry on the merits (which would have been unnecessary if the appellant's contention was right). In addition to the two direct decisions on the point in question, there is also an observation in *Proprietor of Siripuram Estates* v. *Venkatasurya Rao*,[3] where it is stated that all that was necessary to bring a case under Madras Act I of 1876 is that the land in question should be fully owned by a person other than the Zamindar Proprietor. Though the preamble to the Act speaks of "alienation of portions of permanently settled estates by sale or otherwise" when we go to section 2, which speaks of the exact nature of the enquiry to be conducted by the Collector, we find the following words:—

"The Collector shall thereupon hold an enquiry as to who is the present owner of the property in respect of which the application is made."

A person could become owner of property as much by transfer *inter vivos* as by the effect of adverse possession for the statutory period. As mentioned by this Court in *Sambasiva* v. *Raghava*,[4]

"It is hardly necessary to observe that it has been repeatedly held that the title acquired by adverse possession for twelve years is only equivalent to that given by a parliamentary grant of the interest vesting in the party affected by the adverse possession."

We may also refer to a recent decision of the Privy Council in the case reported in *Sreemati Krishna Promada Dasi* v. *Dhirendra Nath Ghosh*.[5] No doubt the Privy Council had there to consider a case that arose in Bengal. This is what their Lordships say:

"The owner of a part of a revenue-paying estate obtaining his title by adverse possession, remains liable for land revenue fixed on the estate

1. (1919) 11 L.W. 389. 2. (1926) 53 M.L.J. 400.
3. (1922) 17 L.W. 6. 4. (1890) I.L.R. 13 M. 512 at 515-6.
5. (1928) L.R. 56 I.A. 74: I.L.R. 56 C. 813 (P.C.).

under section 37 of the Land Revenue Sales Act. *He may, if he so desires, have the portion of the estate which passed to him by adverse possession, separately assessed to land revenue*; but, if he omits to do so, it continues to form part of the security for the whole land revenue of the estate and to be liable to be sold under the regulation in respect of any arrears due." (The italics are ours.)

From this it is clear that it is ordinarily open to any person who has become owner of land by virtue of adverse possession to apply to have separate registration of the same in his name to avoid the risk of the land being sold to recover arrears due, not properly upon it but upon the whole estate of which it was a part. It, therefore, seems to us that Act I of 1876 applies not only to cases of transfer *inter vivos* but also to cases where a person has become owner of property by virtue of adverse possession for the statutory period. We, therefore, follow the two rulings of this Court mentioned above, and overrule the contention raised by the appellant.

On the merits, we find that both the Lower Courts refer to D.C.B. accounts and Amarakam accounts as having been filed as evidence in the case. By reference, however, to the list of witnesses examined and documents filed, we are not able to find any such documents having been exhibited. It is possible since it is clear that these suits were tried along with other suits, that there was some sort of agreement between the parties that these documents should be taken as exhibited and treated as evidence in these cases also, but as the record now stands, we are not able to state definitely what exactly happened. As we should like to know more about these documents before we dispose of these appeals, we call upon the Lower Court to procure and forward to this Court copies of Amarakam and D.C.B. accounts referred to in the Lower Court's judgment. It will also submit a copy of the judgment in O.S. No. 29 of 1923 with all the records, including the B. Diary filed in that suit. It will be open to either party to apply for the printing of any portion of the record so received, leaving it to the Court to decide upon any matters regarding the admissibility of the same in evidence in these second appeals at the time of the final hearing in these cases.

Second Appeal No. 823 *of* 1925.—This case follows our judgment in S.A. No. 821 of 1925.

K.C.

[The final judgment in the case will be reported if it contains any decision on any question of law.—ED.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE PAKENHAM WALSH.

Velliyappa Chetti (Minor) by mother and guardian Lakshmi Achi .. *Appellant** (*6th Deft.*)

v.

Vellayappa Chetti and another .. *Respondents* (*Plffs.*)

Velliyappa Chetti *v.* Vellayappa Chetti.

Civil Procedure Code (*V of* 1908), *O.* 20, *R.* 16—*Suit for accounts—Preliminary decree, if indispensable.*

In every suit for an account of pecuniary transactions, it is not imperative for the Court to pass a preliminary decree in the first instance. It can be dispensed with by the Court where the facts are so simple that the taking of accounts would only involve unnecessary and unprofitable delay.

Hurrinath Rai v. *Krishna Kumar Bakshi*, (1886) L.R. 13 I.A. 123: I.L.R. 14 Cal. 147 (P.C.), followed.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in Original Suit No. 26 of 1921.

C. Padmanabha Aiyangar, S. Ramanuja Aiyangar and *T. E. Ramabhadrachariar* for appellant.

M. Patanjali Sastri and *C. Rama Rao Sahib* for respondents.

The judgment of the Court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—These appeals arise out of a suit filed by the plaintiffs, the 1st plaintiff claiming to be the legatee under the will of his grandfather, for an account of the estate and for possession. He also wanted damages for misfeasance and malfeasance of the executors. The executors are defendants 1 and 5. The Lower Court passed a decree in plaintiffs' favour. The 1st defendant's case was that the 5th defendant was managing the estate till his disappearance in 1915 and that his management was merely formal, *i.e.*, he merely signed in the deposit account and the receipts, Exhibits IV and IV (*a*). The 5th defendant was admittedly not heard of for five or six years before the suit, and he is not heard of even now. His son has been impleaded as being a member of the undivided family. The 5th defendant is *ex parte*. The 6th defendant's mother and guardian, in her written statement, denied that the 5th defendant (her husband) ever took part in the management of the estate. Upon this, issues were raised and the case went to trial. It was found that the 5th defendant

*Appeal No. 407 of 1925. 18th September, 1929.

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did take part in the management of the estate, that he put in monies and collected monies and that he also sold an item of property in which the testator had a third share. Out of the monies which belonged to the estate and which were invested, there was a claim in the plaint for Rs. 40,000 against the 7th defendant. This represented monies belonging to the estate which had been invested. The Subordinate Judge passed a decree for Rs. 40,000 with interest at 6 per cent. per annum. In Appeal No. 120 of 1925 we held that the amount in deposit with 7th defendant was not Rs. 40,000 but Rs. 37,100 on the date of the plaint, and we modified the decree by allowing Rs. 37,100 with interest, as stated above. That money has been paid into Court and there is no question of any loss to the estate so far as that money is concerned except as regards interest which is the subject-matter of the Appeal No. 257. The Subordinate Judge found that there was one more item for which the defendants were accountable and this was a sum of Rs. 3,000 proved to have been collected by the 5th defendant. He allowed that sum with interest at 9 per cent. per annum. As regards that sum, it is not disputed before us that that sum was collected by the 5th defendant, as that is proved beyond all doubt by the account books filed. What is argued is that the Court should not have allowed Rs. 3,000 and interest, but that an account should have been directed to be taken and the 5th defendant given an opportunity of proving certain expenses, which he had incurred for the estate and which he was entitled to credit for. When the case was closed, the 6th defendant put in a petition saying that certain accounts which showed dealings by 5th defendant with the estate were found behind some vessels in the house and wanted admission of these books. The Subordinate Judge, in our opinion, rightly rejected the petition. The question raised in Appeal No. 407 by Mr. Padmanabha Aiyangar is that the Judge ought to have passed a preliminary decree and then sent the case for taking accounts; and he refers to the Privy Council decision in *Hurrinath Rai* v. *Krishna Kumar Bakshi*[1] and to *Mohesh Chunder Bose* v. *Radha Kishen Bhattacharjee*,[2] *Degambar Mozumdar* v. *Kallynath Roy*,[3] *Rajhunath* v. *Ganpatji*,[4] *Ayeshabai* v. *Ebrahim*,[5] *Thirukumaresan Chetti* v. *Subbaraya Chetti*[6] and *Ram Dass* v. *Bhagwat Dass*[7] in support of his view. He

1. (1886) L.R. 13 I.A. 123: I.L.R. 14 C. 147 (P.C.).
2. (1907) 6 C.L.J. 580 at 591.
3. (1881) I.L.R. 7 C. 654.
4. (1904) I.L.R. 27 A. 374.
5. (1908) I.L.R. 32 B. 364.
6. (1897) I.L.R. 20 M. 313.
7. (1904) 1 A.L.J. 347.

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also refers in this connection to Order 20, Rule 16, Schedule I of the Civil Procedure Code and Rules 120 to 136 of the Civil Rules of Practice (Mufussal). There can be little doubt on these authorities that, ordinarily in a case for an account, even though the defendant may deny his accountability, the proper course is to pass a preliminary decree and send the case for taking accounts. But, we do not think that it follows that in every case, irrespective of other considerations, the Court is bound to send the case for taking accounts. Their Lordships of the Privy Council, in dealing with this point, make a reservation. At page 158 they state:

"Their Lordships are not expressing an opinion that in a suit for account it may not appear at the hearing that the issue is so simple and so clearly raised and met by evidence, as to be ready for decision at that time. But the general rule is the other way."

Order 20, Rule 16, also does not make it imperative to pass a preliminary decree apart from any other consideration. All that Rule 16 says is that a preliminary decree may be passed, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken. In the present case we have the fact that so far as the liability of the defendants is concerned it is Rs. 40,000 which was claimed and ultimately decreed, not having been disputed by the 7th defendant except as to Rs. 3,000 and odd which he says was not deposited. His solvency was not disputed and he has paid the sum due into Court. The only question between the executors and the plaintiff was whether the Rs. 3,000 was collected. As regards a sum of about Rs. 780 which was got by the sale of the village, that there was a sale deed and that the amount was received is not disputed. The plaintiff will be entitled to a half of that amount. As regards the Rs. 3,000 as we have said before, it is proved beyond all doubt, and it is not denied before us, that that sum was collected by the 5th defendant. Therefore, when the case came up for disposal, there was the Rs. 3,000 proved to have been collected and no denial in the written statement that the amount was ever collected. No statement was made that any expenses were incurred, nor did the 6th defendant ask the Judge at that stage to allow the expenses he had incurred in connection with that item. The petition to file account books said to have been discovered behind some brass vessels was rightly rejected. It therefore comes, in our opinion, in the category of cases which the Privy Council describes as cases, where the facts are so simple that the taking of accounts will be unnecessarily lengthening the proceedings

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without any benefit to the parties. It may be more complicated, if, in (the connected) Appeal No. 257, the appellants insist on the usual procedure being adopted by reason of other items being charged. But their counsel does not want the case to be sent back for a preliminary decree being passed. In these circumstances, we do not think it is necessary to send the case back for a preliminary decree being passed, which will only mean unnecessary lengthening of the proceedings without any material benefit to anybody. . . . . The result is that Appeal No. 407 will be dismissed with costs.

S.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Palani Goundan .. *Petitioner* (Complainant)*

v.

Krishnappa Goundan and others .. *Respondents (Accused).*

Palani Goundan v. Krishnappa Goundan.

Criminal Procedure Code (V of 1898), Ss. 250 and 262—Summary trial—Recording of reasons necessary.

Even in summary trials under Chapter XXII of the Code, the requisites of S. 250 must be satisfied and the record should contain the reasons for considering the complaint to be false and vexatious.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the Coimbatore Division in Criminal Appeal No. 14 of 1929 preferred against the judgment of the Court of the First Class Bench of Magistrates, Dharapuram, in B.C. No. 71 of 1929.

K. Periasami Goundar for petitioner.

Respondent not represented.

The Court made the following

ORDER.—This is a petition to revise an order awarding compensation to six accused (at Rs. 10 each) made by the First Class Bench of Magistrates of Dharapuram and confirmed by the learned Sessions Judge of Coimbatore. Two objections are raised (1) that the record of the trial does not contain, as it should, the reasons why the Bench considered the complaint to be false and vexatious, and (2) that this vitiates the order.

On the first point on which there seems to be no direct decision of this Court, the contention must be upheld that even

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*Cr. Rev. Case No. 27 of 1930. 28th March, 1930.
Cr. Rev. P. No. 26 of 1930.

Palani Goundan v. Krishnappa Goundan.

in records of summary trials under Chapter XXII of the Criminal Procedure Code where the Magistrate or Bench acts under section 250, the requisites of that section as to recording of reasons must be carried out. This seems to follow from the provisions of section 262 which lays down that the procedure prescribed for summons cases shall be followed in summons cases and that prescribed for warrant cases shall be followed in warrant cases even when they are tried in a summary way. The only exceptions to this rule are contained in the next two following sections 263 and 264. The former applies to cases where no appeal lies and the latter to cases in which an appeal lies, which means, to cases where an appealable sentence is or is not passed upon the accused. These sections 263 and 264 do not, if reasonably read, provide for proceedings under section 250 by which alone compensation to the accused is ordered against the complainant. There being thus no express exception from the general rule laid down by section 262, it follows that even in summary trials the requisition of section 250 must be satisfied.

The next question is whether in this case they have been satisfied. This point was apparently not raised before the Sessions Judge on behalf of the petitioner. But that learned Judge was of opinion that the Order of the Bench does not contain a record of reasons for awarding compensation although he also thought that the omission had not prejudiced the appellant and therefore did not, under section 537, invalidate the order. Taking the record of the trial as a whole and remembering that the record is itself the record of a summary trial, it is not quite accurate to say that it does not contain a record of reasons for awarding compensation. After the evidence was closed, the Bench put the following question to the complainant:—

"The case brought by you has been proved to be false and vexatious and it is clear that this has been brought simply to harass the accused. Please show cause why a compensation of Rs. 25 to each of the accused or Rs. 150 in all should not be ordered."

The complainant answered that the case brought by him was true. The Bench, therefore, go on to state that when called on to explain why the compensation should not be ordered for bringing this false and vexatious complaint, P.W. 1 says that his complaint was true and that this is no explanation at all. Then they make the order directing him to pay Rs. 25 each. Reading this in a fair and reasonable way the passage where the Bench said that it is clear that this case has been brought simply to harass the accused, although it occurs as a

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portion of the question put to the complainant, may be understood and must have been intended as a record of their own reasons for thinking that the complaint was false and vexatious. They had just then taken the evidence and the impression made by it upon their minds was still quite fresh and they concluded, as they said in plain terms, that the case was false and vexatious because it was brought to harass the accused. I am not able to say that the requirements of law have not been satisfied. It is needless to add that, even if there had been any omission, section 537 would have been sufficient to cure the omission in view of the fact that the petitioner himself did not raise the question before the Sessions Judge.

The petition is dismissed.

S.R. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

[In the matter of P. Kumaraswami Rao, an insolvent.]

L. V. Narasimha Sastri *Appellant** (*Applicant*)

v.

The Official Assignee of Madras .... *Respondent* (*Respt.*).

Narasimha Sastri v. The Official Assignee of Madras.

Presidency Towns Insolvency Act (III of 1909)—Ex parte *decree in suit on lost promissory note—Application for arrest of judgment-debtor—Application by judgment-debtor to be declared insolvent without seeking to set aside* ex parte *decree—Allegation that the promissory note was fictitious and that he was not properly served with summons—Decree debt shown as the only debt in the schedule—Power of the Official Assignee to investigate into the judgment debt.*

Where an *ex parte* decree was obtained on a lost promissory note and the judgment-debtor filed an insolvency petition, when he was sought to be arrested in execution of the decree, alleging that the promissory note was a fictitious one and that he was not properly served with summons in the suit and showing in the schedule to the petition this decree debt as the only debt for which he was liable without seeking to have the *ex parte* decree set aside on these grounds, and he was duly declared insolvent,

Held that, though the Official Assignee has power to investigate into the debts attempted to be proved before him whatever their nature may be and whether founded on a contract, loan, or a judgment or a decree, the basis of this jurisdiction is the necessity of protecting other creditors of the debtor, and that, as in this case there were no other creditors and the effect of holding this debt to be fictitious would be to annul the insolvency, and the debtor himself did not avail himself of the opportunity he had to get this judgment debt examined by the Court by filing an application to set aside the *ex parte* decree, the Official Assignee had no power to investigate into the judgment debt.

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*O.S. Appeal No. 25 of 1929. 18th December, 1929.

Narasimha Sastri v. The Official Assignee of Madras.

On appeal from the judgment of the Honourable Mr. Justice Kumaraswami Sastri, dated 21st January, 1929, and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 190 of 1925 in Petition No. 263 of 1923.

K. S. Krishnaswami Aiyangar instructed by *C. T. Sundaram* for appellant.

S. G. Sadagopa Mudaliar for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS. *Ramesam, J.*—This is an appeal against the order of our brother Kumaraswami Sastri, J., in the course of insolvency proceedings relating to the insolvency of P. Kumaraswami Rao, in I.P. No. 263 of 1923. The facts out of which this appeal arises may be stated. The appellant before us L. V. Narasimha Sastri got a decree against the insolvent in O.S. No. 282 of 1922 on the file of the District Munsif's Court of Cocanada on a promissory note said to have been dated 28th January, 1921, and said to have been lost. This decree was sought to be executed against the insolvent. It was transferred to Madras and in execution of it the insolvent was sought to be arrested on the 20th August, 1923. He at once sought the protection of the Insolvency Court. In that petition he alleged that the promissory note on which this decree was obtained was a fictitious one and that he was also not properly served with summons from the District Munsif's Court of Cocanada. In the schedule to the petition he showed this decree debt as the only debt for which he was liable. He was duly declared insolvent and his properties vested in the Official Assignee. Immediately the appellant sought to prove his debt by producing his decree. The Official Assignee held that the debt was not proved. There was an appeal by way of notice of motion seeking to set aside the order of the Official Assignee. This was on 28th April, 1925. This petition was adjourned and on 19th August, 1925, an order was issued for a Commission to examine witnesses. On 4th September two witnesses were examined on Commission, (1) Mr. Y. Kameswara Rao, a First Grade Pleader of 28 years' standing of Cocanada, and (2) P. Bhimalingamurthi, a Municipal Councillor of Cocanada, but these were not cross-examined on that occasion. So a further Commission was ordered to issue for the cross-examination of these witnesses and on 24th October, 1925, these two witnesses were cross-examined. Afterwards two other witnesses, P. Subba Rao and the appellant himself were examined before the

Official Assignee. P. Subba Rao was the original payee who was said to have endorsed the note to the appellant. The second witness Bhimalingamurthi was an attestor and the first witness, the Vakil, says that the note was shown to him, that he issued the registered notice to the insolvent, that afterwards he filed the suit and in the interval the suit note was lost. On 1st February, 1926, the case was sent back to the Official Assignee. On 2nd November, 1928, the petition was ordered by the Assistant Registrar to be posted before the Court as nothing was done by the Official Assignee but it was not so posted. There were further adjournments in December, 1928 and finally on 11th January, 1929, the Official Assignee sent his report to the Original Side. On 21st January, 1929, the matter came up before our learned brother and he ordered the application of April, 1925, to be dismissed. The present appeal is against this order.

It appears that the only debt to which this insolvent is liable is this decree debt. If this decree debt is a spurious debt and is held to be no debt then there is no insolvency. A man cannot be insolvent without any debts to pay. But in the present case, because execution was attempted against him by arrest he applied to be declared insolvent and used the Insolvency Jurisdiction for attacking the nature of the debt and for contending that that was a fictitious debt. There is no doubt about the powers of the Official Assignee to investigate into the debts attempted to be proved before him whatever their nature may be and whether founded on a contract, loan or a judgment or a decree. In Ex parte *Revell*. In re *Tollemache*[1] Baggallay, L.J., says:

"The rule is clearly stated by Lord Justice James, in *Ex parte Kibble*,[2] thus:—'It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relatives without any debt being due on them at all; it is, therefore, necessary that the consideration of the judgment should be liable to investigation."

Then he proceeds:

"I do not wish to lay it down as a rule that the Court should inquire into the consideration for a judgment debt when nothing is shewn to justify the inquiry. I am disposed to think that *prima facie* a judgment

1. (1884) 13 Q.B. 720.

2. (1875) L.R. 10 Ch. 373 at 376.

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ought to be considered as binding. But, if a proper case is made, I think the Court ought to direct an inquiry into the consideration for a judgment debt."

At page 725, Cotton, L.J., says:

"In bankruptcy a judgment certainly stands in a different position from that in which it previously stood as against the debtor himself, because the rights of the other creditors of the bankrupt have supervened. When a person is *sui juris* a judgment against him is a very strong *prima facie* evidence against him of the existence of a debt; if he disputes it, he must satisfy the Court that there is some reason which requires that the judgment should be set aside."

In In re *Flatau;* Ex parte *Scotch Whisky Distillers, Ltd.*[3] Lord Esher, M.R., says:

"When an issue has been determined in any other Court, if evidence is brought before the Court of Bankruptcy of circumstances tending to shew that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition."

In In re *Saville.* Ex parte *Saville*[4] the same learned Judge observes:

"It does not decide that there being a judgment, on the mere suggestion of the debtor that the judgment debt is bad, the Court of Bankruptcy is bound to go behind the judgment and inquire into the validity of the debt. There is a judgment debt. That is a sufficient debt on which to found a bankruptcy. It is true, that if suggestions are made and some plausible evidence given, that the judgment debt does not really exist, the Court may well examine into it. . . . . Nothing was offered against the circumstances except the statement of the debtor, which he had ample opportunity and which it was to his interest to bring forward before."

In the present case there seems to be some ground for suggesting that the insolvent was not properly served with summons in the District Munsif's Court of Cocanada. At any rate it appears that he was not personally served though the service may be declared sufficient in law. When he was arrested in August, 1923, he had an opportunity to contest before the District Munsif's Court to set aside the *ex parte* decree. Under Art. 164 of the Limitation Act he has 30 days to get that decree set aside, but not having done so the decree has now become incapable of being set aside. The debtor himself, therefore, cannot get rid of that decree assuming it is a wrong or an unjust decree. This, of course, does not prevent the Official Assignee in Insolvency from investigating into the nature of the debt if there are grounds for doing so. The cases I have cited show

3. (1888) 22 Q.B. 83.

4. (1887) 4 Morrell 277.

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that the basis of his jurisdiction and the reason for his investigating into judgment claims is the necessity of protecting other creditors. Where there are no other creditors the reason for examining into this judgment-debt especially when the debtor himself allowed the opportunity he had to pass by becomes much less. In In re *Van Laun.* Ex parte *Chatterton*[5] Cozens-Hardy, M.R., says:

"The trustee in bankruptcy can say 'You are a person who comes in to prove a debt. It is my duty to see that this bankrupt's assets are distributed amongst those who are justly, legally and properly creditors of the estate. In order to enable me to do my duty, I ask you to furnish me with such information as will enable me to do that which I am told to do by Rule 22 in the Second Schedule to the Act, to examine every proof and the grounds of the debt'."

Buckley, L.J., says:

"The trustee is entitled to say 'It is my business to see that those who seek to rank against this estate are persons who are really creditors of that estate'."

In In re *Campbell.* Ex parte *Seal*[6] a judgment was obtained which was opposed to the terms of the Money-lenders Act. There was afterwards a further agreement with reference to that judgment. It was held that it is open to the Court to find that the judgment and the further arrangement are both illegal and as they are opposed to the Money-lenders Act, are unlawful and void and constitute a criminal offence. That case, therefore, does not help the respondent. In the present case, as already stated, the only purpose for which the judgment is being attacked is to say that the decree debt was wrongly passed. If the contention of the Official Assignee is upheld then there is no reason for declaring the insolvent an insolvent and if the insolvency is annulled his protection is lost and the decree can be executed against the insolvent by attachment and arrest. In the latter case he will resort to insolvency again. Thus, we got into a vicious circle. I do not think this jurisdiction of the Official Assignee to inquire into debts could be used as a device to escape the execution of a decree where the only debt of the insolvent is the decree and there are no other debts. It seems to me that the Insolvency Jurisdiction should not be used as a device to evade execution of a decree which has become final and unimpeachable as in the present case. However, evidence has been adduced by the appellant. His vakil, R.W. 1, says that he saw the promissory note. It is true that such evidence cannot prove the genuineness of the note. It only

5. (1907) 2 K.B. 23. 6. (1911) 2 K.B. 992.

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shows that the alleged note was shown to the vakil for the purpose of issuing a notice but that takes the appellant's case to a certain stage. Then we have got the evidence of R.W. 2. He was the attestor. He was a Municipal Councillor of Cocanada. Though it does not appear that he is a man of very affluent circumstances nothing is elicited against him as to why he should join in a conspiracy to support the alleged note or why he should depose against the insolvent. Then there is the evidence of the appellant which of course is somewhat interested but it must be remembered after all that he is only the endorsee of the note and not the original lender, the original lender being R.W. 3, P. Subba Rao. The Official Assignee in his report relies on two circumstances: (1) that the summons was not properly served and, therefore, the insolvent is not bound by the decree. In the first place it is for the Court which passed the decree to inquire into the question whether the summons was properly served. (2) He relies upon a judgment in Madras Small Cause Court Suit No. 9738, a suit instituted by the insolvent against an Advocate of this Court, Mr. P.C. Venkataramanayya Pantulu for a sum of Rs. 600 and odd. In that suit it was the case of the insolvent that the Rs. 1,300 admittedly sent by Subba Rao according to both the parties was sent not as a loan but as payment on behalf of Mr. P.C. Venkataramanayya, who owed Rs. 2,500 to the insolvent and that suit was for Rs. 600 settled by mediators as the sum still due in respect of the balance of Rs. 1,200. The subject-matter of this suit is not this Rs. 1,300 but the remaining Rs. 1,200. The appellant before us was not a party to that suit. The Small Cause Judge decreed the suit for Rs. 600 and odd. Incidentally he made remarks about the nature of the payment of Rs. 1,300. Surely observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. The appellant was not a party to that suit and he had no opportunity to cross-examine the witnesses there. The Official Assignee beyond referring to the judgment of the Small Cause Court and the fact that the summons was not properly served did not go into the matter or examine evidence. The evidence for the appellant was not contradicted by either evidence on behalf of the insolvent or the Official Assignee. The respondent now asks for a further opportunity of adducing further evidence. We do not think there is a case made out for further evidence. The Official Assignee was content to report before the learned Judge on the materials available then. We do not think this

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is a case in which the suspicions that have been suggested against the appellant's case ought to be allowed to practically vacate the decree of the District Munsif's Court of Cocanada, especially when it is the only debt subsisting against the insolvent. We think the debt must be regarded as proved and we allow the appeal.

The Official Assignee will pay the appellant's and his own costs out of fees of his Office Charges Fund. No costs in the Lower Court for both sides.

Cornish, J.

Cornish, J.—I am of the same opinion. Although the debtor was probably ignorant of the suit filed by the creditor in the Cocanada Court he certainly became aware that an *ex parte* decree had been passed against him when he was arrested in execution of the decree. Instead of taking steps to have the decree set aside—and his omission is the more remarkable because in a subsequent affidavit he described the decree as a fraudulent decree—the debtor apparently preferred to take refuge in the Insolvency Act and to get himself adjudicated an insolvent. Order 9, Rule 13, Sch. I, Civil Procedure Code, provides a simple procedure for getting an *ex parte* decree set aside, and Art. 164 of the Limitation Act prescribes the time within which steps must be taken. By allowing this decree to stand, therefore, the debtor permitted strong *prima facie* evidence of the validity of the debt to remain. No doubt the Official Assignee acted within his rights in investigating the circumstances in which this decree was passed. As observed in In re *Van Laun.* Ex parte *Chatterton*[5]

"The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right."

It was open to the Official Assignee, therefore, to satisfy by evidence the Insolvency Court that, either on account of fraud or collusion or miscarriage of justice, the Court should go behind the decree and invalidate the decree-debt. But the only evidence—and I am assuming that it is evidence by reason of Rule 117 of the Insolvency Rules—before the Insolvency Court was the report of the Official Assignee, and the only ground given in the report for treating the decree as not binding on the debtor is the Official Assignee's finding that the summons in the suit was not properly served on the debtor. The only

5. (1907) 2 K.B. 23 at 30.

Narasimha Sastri v. The Official Assignee of Madras.

Cornish, J.

reason given in the report for discrediting the evidence of the creditor and his witnesses in support of his claim is a bare reference to a quite irrelevant finding (that is to say, irrelevant to this enquiry), by the Judge of the Small Cause Court in a suit between the debtor and some other person, to which the creditor was not a party and in which he did not give evidence. In my opinion these materials are not sufficient evidence either of collusion or of fraud or of miscarriage of justice as would justify the Insolvency Court in invalidating the decree and holding that the debt is not binding upon or proved against the debtor.

N.S. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD ATKIN, LORD TOMLIN AND SIR LANCELOT SANDERSON.

Sagarmull Nathany .. *Appellant**

v.

John Carapiet Galstaun .. *Respondent.*

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Pleadings—Variance between plaint and case alleged at the trial.

Pleadings should not be construed too narrowly, and, therefore, in dealing with the question whether there has been a variance between a plaintiff's pleadings and the case alleged at the trial, the Court must look not to the mere wording of the plaint but to the issues which were settled for trial and to the manner in which the case was deliberately fought out by both the parties in the Trial Court.

Appeal No. 116 of 1928 from a decree, dated the 16th January, 1928, of the High Court, Calcutta, Civil Appellate Jurisdiction, setting aside a decree, dated the 24th January, 1927, of the said High Court, Original Civil Jurisdiction.

The material facts of the case, for purposes of the present report, appear sufficiently fully in their Lordships' judgment.

Dunne, K.C. and *Parikh* for appellant.

De Gruyther, K.C. and *McNair* for respondent.

5th May, 1930. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—This is an appeal in two consolidated suits (Nos. 1136 and 1138 of 1920) brought by the assignor of the

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*P.C. Appeal No. 116 of 1928. 5th May, 1930.

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appellant against the respondent. The consolidated suits were tried before Mr. Justice Chotzner in the High Court of Judicature at Fort William in Bengal, Original Civil Jurisdiction, with the result that a decree in favour of the plaintiff was made on the 24th January, 1927.

The respondent appealed, and on the 16th January, 1928, the High Court Civil Appellate Jurisdiction reversed Mr. Justice Chotzner and dismissed the consolidated suits.

The appellant thereupon appealed to His Majesty in Council.

The story of the transactions out of which the suits arise is somewhat intricate, but for the present purpose is sufficiently stated in what follows.

One Pity owed the appellant money and in March, 1910, the appellant obtained a decree against Pity for Rs. 1,40,000. Pity was the owner of property in Wellesley Street, Calcutta. An arrangement was entered into and carried out between Pity, the appellant and the respondent to the following effect. The appellant borrowed from the Bank of Bengal Rs. 1,50,000. To enable the appellant to obtain this loan the respondent, for a 1 per cent. commission, guaranteed the loan to the Bank. The appellant drew a promissory note for the amount borrowed from the Bank in favour of the respondent, who endorsed it over to the Bank. Out of the monies so borrowed the appellant lent to Pity the amount required to enable the latter to discharge his indebtedness to the appellant. Pity accordingly paid his debt to the appellant. At the same time Pity deposited with the appellant and the respondent the title deeds of the Wellesley Street property to secure the amount lent to him by the appellant.

It is not suggested that as between the appellant and the respondent the latter had any interest in Pity's mortgage beyond his right to be secured thereout against his liability as guarantor to the Bank for the appellant's debt.

On the 9th August, 1910, the appellant and respondent launched a suit (No. 839 of 1910) against Pity to enforce the mortgage. On the 27th November, 1910, a final decree for sale was made in the suit, both the appellant and the respondent being given liberty to bid. Nothing further was done for some years. On the 5th August, 1914, the respondent paid to the Bank the sum of Rs. 31,350-12-5 for interest on the appellant's debt to the Bank, and also from time to time until the date of

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the sale next to be mentioned, under an authority from Pity, collected the rents of the Wellesley Street property, and paid them to the Bank on account of the interest due on the appellant's debt to the Bank.

On the 29th January, 1916, the Wellesley Street property was put up for sale under the decree of the 27th November, 1910, and the respondent, under the liberty reserved to him by the decree, bid for and was declared the purchaser of the property; the purchase price was Rs. 1,25,000, a sum less than the total amount owing under the decree. The respondent paid to the Registrar a deposit of Rs. 31,250 out of his own monies.

Apart from the debt to the Bank there was at this time another account open between the appellant and the respondent upon which money was owing to the respondent. To secure this account the appellant had deposited certain jewellery with the respondent. Differences arose between the appellant and respondent in connection with the transactions which have been described, and one Mitter, a mutual friend of both parties, intervened to compose them. Mitter's story, which was accepted by the Trial Judge, and is not questioned by the High Court, is that on the 12th July, 1917, a verbal agreement was made between the respondent and Mitter, who in this regard acted as agent for the appellant.

The first part of the agreement was to the following effect, namely:—

(1) That the amount due to the respondent in respect of the account secured by the deposit of jewellery was agreed as Rs. 31,000, of which Rs. 27,000 was to be paid at once and the balance of Rs. 4,000 was to be paid before December then next.

(2) That upon payment of the Rs. 27,000 the jewellery was to be returned by the respondent.

It seems clear that into the account so settled there was brought in the amount for interest paid by the respondent to the Bank in August, 1914, and his claim for commission in respect of the Bank's loan.

The second part of the agreement was that the appellant should pay forthwith to the Bank the amount then claimed by the Bank for interest, which had been ascertained at Rs. 30,275-14-1 and keep down the future interest so far as the rents were insufficient to meet them, and that the respondent should make over the Wellesley Street property to the appellant upon the ultimate payment of the capital and interest of the Bank's loan. The appellant alleged he was to have three

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years in which to make the ultimate payment, but in this respect he was not corroborated by Mitter. As soon as agreement was reached Mitter obtained from the appellant a cheque in his own favour for Rs. 57,275-14-1 to cover (*a*) the Rs. 27,000, the first instalment of the Rs. 31,000, and (*b*) the Rs. 30,275-14-1 due for interest, and endorsed this cheque over to the respondent. At the same time Mitter handed to the respondent a form of receipt which he was to sign and return with the jewellery on the following day.

The respondent took the cheque for Rs. 57,250-14-1 and paid Rs. 30,275-14-1 to the Bank, but on various excuses he refused to sign the receipt or to return the jewellery. The matter dragged on till October, when a modification of the July agreement was reached. Both Courts below find that a modification of the agreement took place in October, but it is not clear what either Court considered the full scope of the modification to have been. In their Lordships' judgment the effect of the modification was as follows, namely:—

(1) That the Rs. 4,000 balance of the Rs. 31,000, should be increased to Rs. 6,000.

(2) That upon payment of the Rs. 6,000 the jewellery should be handed over by the respondent to the appellant.

(3) That the sale of the Wellesley Street property should be confirmed in the respondent's name, the price of Rs. 1,25,000 being set off against the decree and that the deposit paid by the respondent should be returned to him.

(4) That the appellant should pay to the respondent interest at the usual Bank rate on the deposit from the time it was made until its payment, and

(5) That upon payment by the appellant to the Bank of what was due to the Bank and to the respondent of what is due to him in respect of the matters which have been mentioned, the respondent should make over the Wellesley Street property to the appellant.

Accordingly on the 20th October, 1917, an order was made confirming the sale to the respondent, who was given liberty to set off the amount of the purchase price, viz., Rs. 1,25,000, against what was due to the appellant and respondent under the decree, and the Registrar was directed to return the deposit to the respondent. The deposit, less the Registrar's commission, was returned to the respondent, but in the first instance, with a view to saving costs, no sale certificate was taken out.

On the 24th January, 1918, the appellant executed a fresh promissory note in favour of the Bank. No further progress was made during the year 1918. The appellant did not pay any interest to the Bank and no rents were paid into the Bank by the respondent after the 29th January, 1916. There is some suggestion that Pity made a payment to the respondent in respect

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of the balance of the decree against him remaining after the set off directed by the order of the 20th October, 1917.

On the 18th January, 1919, the appellant's solicitors wrote to the respondent's solicitors that their client had made every arrangement to pay off the amount due and asked for particulars of the Bank's debt. No answer was received.

On the 10th February, 1919, the respondent took out the sale certificate in his own name and on the 14th February, 1919, his solicitors wrote to the appellant's solicitors informing them of the fact and setting up a claim on their client's behalf to be paid a sum of Rs. 1,72,386-14-9, which included items already dealt with in the settlement of July, 1917, and a large item in respect of certain jute transactions which up to that point had not come into the matter.

Further correspondence followed in which in effect the respondent claimed the Wellesley Street property as his own, alleged that the cheque for Rs. 57,275-14-1, received by him in July, 1917, was paid on general account, claimed that the jewellery was deposited to cover all accounts, and reiterated his claim in respect of the jute transactions.

On the 22nd September, 1919, the respondent sold the Wellesley Street property for Rs. 2,04,000, and on the 17th February, 1920, he paid off the amount due to the Bank. The difference between the sale price and what was paid to the Bank was about Rs. 29,000. Shortly afterwards the appellant launched the present suits.

In the first suit he claimed (1) a return of the jewellery upon payment of the Rs. 4,000 in accordance with the agreement of July, 1917, and damages for conversion, or alternatively (2) payment of the value of the jewellery with interest.

It is to be observed that no reference is made in this plaint to the modified agreement made in October, 1917.

In the second suit the appellant claimed damages against the defendant, alleging in effect a sale of the Wellesley property in breach of the respondent's obligations to the appellant and at an undervalue. The parties were unable to agree the form of the issues, though both parties seem to have accepted the view that in each suit one of the issues should be whether if there was an agreement in July, 1917, there was any subsequent modification of that agreement.

Ultimately the trial proceeded and the issues were settled by the Trial Judge, who incorporated them in his judgment.

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The issues were as follows:—

"(1) Was there an agreement on the 12th July, 1917, whereby:—

"(*a*) Defendant should accept Rs. 31,000 in full settlement of his claim? Rs. 27,000 to be paid at once and Rs. 4,000 in the following December and thereupon to return the jewellery to the plaintiff.

"(*b*) The plaintiff should pay the accrued interest to the Bank reducing the amount due to the capital figure of the loan, namely, Rs. 1,50,000, and on payment thereof become solely entitled to the property?

"(2) Was the agreement modified in the following October to the extent that the plaintiff was to pay the defendant Rs. 6,000 instead of Rs. 4,000?

"(3) Was this agreement broken by the defendant? If so, what damages is the plaintiff entitled to?

"(4) If there was no such agreement or if it was not broken by the defendant, is the plaintiff as a joint decree-holder with the defendant entitled to any relief against him in consequence of the sale of the property."

The learned Trial Judge in substance found in the affirmative on issues 1 and 2 and on the first part of issue 3, and treated issue 4 as in the circumstances not arising. The learned Judge seems to have taken the view that the sale was a breach of agreement, and that there was some evidence to justify the question of undervalue being investigated on an enquiry as to damages.

By the decree in respect of the first suit the respondent was ordered to pay to the appellant Rs. 20 as damages for detention of the jewellery and upon payment by the appellant of Rs. 6,000 to deliver over the jewellery to the appellant, and in respect of the second suit (1) it was referred to the Assistant Referee to take an account of the sums, if any, due to the respondent by the appellant under the agreement mentioned in the plaint and issues in the second suit, and (2) to ascertain the amount of damages due to the appellant from the respondent in respect of breach of the said agreement, and the further hearing of the second suit was adjourned.

The respondent appealed. The High Court allowed the appeal and dismissed both suits. The ground of dismissal in the first suit was that the plaint was confined to the agreement of July, 1917, and that there was, therefore, a variance between the pleadings and the case alleged at the trial.

As to the second suit the High Court held that the proper inference from what took place in October, 1917, was that the parties agreed that the respondent should be the absolute owner of the Wellesley Street property, but subject to an option to the appellant to purchase back the property within a reasonable time, and that the appellant had failed within a reasonable time to exercise the option.

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A full and critical examination of the material available has, with the assistance of counsel, been made before their Lordships' Board.

Their Lordships, so far as the first suit is concerned, see no reason to differ from the main findings of facts of the Trial Judge, and are of opinion that the High Court founded themselves upon too narrow a ground in dismissing the suit for variance. Their Lordships are satisfied that, notwithstanding the form of the plaint, the suit was fought by the parties deliberately upon issues substantially as framed by the Trial Judge and ought upon that footing to be determined.

The second suit presents more difficulty, but their Lordships find themselves unable to escape the conclusion that the High Court in forming an opinion upon the events of October, 1917, have not given sufficient weight to what was the dominant relation between the parties in connection with the Wellesley Street property.

Their Lordships are unable to accept Mr. Justice Ghose's view that in law the property belonged to the plaintiff and defendant in equal shares when the order of the 20th October, 1917, was made.

There is no doubt that up to the moment when the respondent was declared the purchaser of the property his interest in it as between himself and the appellant was this and this only, that he was entitled to treat himself as secured by means of Pity's mortgage against any liability with which he might ultimately be fixed in respect of the loan by the Bank. What the purpose was in the respondent becoming the purchaser of the property is not clear upon the evidence, though there is material from which it might fairly be inferred that he did so by arrangement with the appellant merely to get rid of Pity's interest in the property and not so as to alter the relation between himself and the appellant. Their Lordships do not find anything to support Mr. Justice Buckland's statement that it was not disputed that the purchase was on behalf of the two unless that statement is intended to express the position which has just been indicated. However this may be, their Lordships are of opinion that the transactions of October, 1917, either continued or restored the original relation between the parties. In other words as from October, 1917, at any rate, the respondent had no interest in the property except as a creditor with a security upon it, but the field of indebtedness covered by the security was somewhat enlarged because in their Lordships' view the

respondent was to have secured to him payment of the Rs. 6,000 and the interest on his deposit as well as to be protected against liability in respect of the Bank's loan.

Upon this footing the respondent held the property to secure himself in the manner indicated and subject thereto was a trustee of it for the appellant—a sale by him of the property without the concurrence of the appellant who was entitled in equity to redeem it could not be justified.

Upon the question of undervalue their Lordships see no reason to differ from the view taken by the Trial Judge, and think that there is sufficient evidence to justify an enquiry being directed to bring out whether the sale was or was not at an undervalue. In all the circumstances and for the reasons which have been indicated their Lordships are of opinion that the appeal should be allowed and that the decree of the High Court of the 16th January, 1928, should be discharged, and that the following relief should be given, that is to say:—

I. That the decree of Mr. Justice Chotzner should be restored so far as it directs delivery up by the respondent to the appellant of the jewellery upon payment of the Rs. 6,000, and so far as it gives relief by way of enquiry as to value in the event of the respondent failing to deliver up the jewellery to the appellant.

II. That it should be declared that the respondent held the Wellesley Street property as a security for (*a*) all sums paid by him since October, 1917, for principal and interest in respect of his obligation as guarantor of the Bank's debt; (*b*) the sum of Rs. 6,000 agreed to be paid to him in October, 1917; (*c*) interest at the usual Bank rate on the deposit of Rs. 31,250 in accordance with the agreement of October, 1917; and (*d*) his mortgagee's costs, charges and expenses properly incurred, including the Registrar's commission on the deposit, and any costs of taking out the sale certificate, and that, subject as aforesaid, the respondent held the Wellesley Street property in trust for the appellant.

III. That it should be also declared that the sale by the respondent without the appellant's consent of the Wellesley Street property was a breach of the respondent's duty to the appellant.

IV. That the matter be remitted to the High Court in order that directions may be given—

(1) for the taking of the following accounts and enquiry

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(that is to say)—

(*a*) An account of what is due from the appellant to the respondent upon the footing of the declaration No. II.

(*b*) An account against the respondent of (*i*) the proceeds of sale of the Wellesley Street property received by the respondent; (*ii*) the rents of the same property since the 29th January, 1916, upon the footing of the respondent being a mortgagee in possession; and (*iii*) any monies received by the respondent from Pity in satisfaction of the decree against Pity.

(*c*) An inquiry what damages (if any) the appellant has suffered by reason of the sale, the question whether or not the sale was at an undervalue to be taken into consideration upon the enquiry: and

(2) for setting off what is certified under account (*a*) against the aggregate of what is certified under account (*b*) and enquiry (*c*), with consequential directions for payment of the balance to the party entitled.

V. That the costs of the appellant before their Lordships' Board and in the Courts below heretofore incurred be paid by the respondent, but that the costs of and consequent upon the accounts and enquiry to be taken as the result of this appeal be reserved to be dealt with by the High Court or as the High Court shall direct.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Stanley Johnson & Allen.*

Solicitors for respondent: *Morgan, Price, Marley & Rugg.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Cyprus.]

PRESENT:—LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE AND LORD THANKERTON.

The Ottoman Bank .. *Appellants**

v.

Etienne Chakarian .. *Respondent.*

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The Ottoman Bank *v.* Etienne Chakarian.

Master and servant—Servant—Personal danger to—Risk of—Order for service at particular place involving—Legality of—Disobedience by servant of, though willing to work at other places free from such danger—Dismissal for grave fault in case of—Validity of—Damages for wrongful dismissal—Claim for—Maintainability.

The respondent was an employee of the appellant Bank. By his contract of service he was bound to serve as an employee of the Bank at Constantinople and other places. On being asked to the appellant Bank that he being a Turkish subject, his life was in danger at Constantinople in its then troubled state, and requested a provisional transfer to one of the Bank's agencies outside Turkey. The appellant declined to accede to

*P.C. Appeal No. 129 of 1928. 21st January, 1930.

that request and refused to allow him to leave, whereupon the respondent fled from Constantinople. The appellant Bank dismissed him from service without notice and without pension for grave fault within the meaning of the book of regulations which dealt with conditions of service and a contributory pension fund for the staff.

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In a suit brought by the respondent for damages for wrongful dismissal,

Held, (*i*) that the risk to the respondent was such that he was not bound to obey the Bank's order to him to remain in Constantinople and the said order was, therefore, not a lawful one;

(*ii*) that the respondent's refusal was not a grave fault within the meaning of the book of regulations;

(*iii*) that the respondent's offer of service outside Turkey afforded a complete answer to the appellant's pleas that the respondent was under a permanent disability to serve the appellant and that that contract of service had become incapable of performance by the time of dismissal;

(*iv*) that respondent was, therefore, entitled to damages for wrongful dismissal.

Consolidated Appeal and Cross-Appeal No. 129 of 1928 from a judgment of the Supreme Court of Cyprus, dated 25th March, 1928, varying a judgment of the District Court of Nicosia.

H. P. Macmillan, K.C., Geoffrey Lawrence, K.C., Ronald Smith and *I. W. G. Barry* for appellants.

A. M. Latter, K.C. and *S. O. H. Collins* for respondent.

21st January, 1930. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—In this action the plaintiff, who is respondent in the leading appeal, seeks to recover damages for wrongful dismissal from the defendant Bank, who are appellants in the leading appeal.

The Trial Judge found the appellants liable in damages, which he assessed on an alternative basis. The appellants appealed to the Supreme Court of Cyprus, who affirmed the Trial Judge on the question of liability, but directed the re-assessment of damages on a lower basis. From that judgment the leading appeal was taken by the appellants on the question of liability, and the respondent has taken a cross-appeal on the question of damages.

The respondent, who was an Armenian and a Turkish subject, became a temporary employee of the appellant Bank in 1901 at the branch office at Aidin in Turkish Asia Minor. In 1903 he entered the permanent service of the Bank, and subscribed to a book of regulations, called "Caisse de Pensions et de Retraites," which deals with conditions of service and a contributory pension fund for the staff. He continued in their

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service until 27th January, 1923, when he was dismissed without notice and without pension under the circumstances referred to later.

The respondent remained at the Aidin Branch until 1913, when he went to the Sokia Branch, from which he was retransferred to Aidin in June, 1919, immediately before the destruction of Aidin by the Kemalists, by whom he was imprisoned and sentenced to death. The timely arrival of the Greek forces enabled him to avoid the execution of the sentence and to escape to Smyrna. After various changes he came back to Smyrna in July, 1920, and he remained there until 8th September, 1922, when he applied for and obtained leave, but was asked by Mr. Simmons, the branch manager, to take a confidential letter to the Head Office at Constantinople.

The respondent arrived at Constantinople on 10th September, 1922, delivered the letter, and was given temporary employment at the Head Office, which appears to have superseded his leave. Meantime Smyrna was destroyed by the Turkish forces. The respondent's story of his experiences at Constantinople, which substantially remains unchallenged, is as follows:—

"I found Constantinople in a disturbed state. I went to the Bank and saw Mr. Ungar, the sub-manager in the Direction Generale. I gave the confidential letter Mr. Simmons had given me to Mr. Ungar. I also told him what Mr. Simmons had told me confidentially. I explained to him the state of affairs in Smyrna. At this interview I asked him to allow me to leave Constantinople; because it was unsafe for me to remain. I told him I had been condemned to death at Aidin and that, therefore, I could not remain. Mr. Ungar referred me to Mr. Skanzianni, le chef du Personnel. I saw him. At the office of Mr. Skanzianni, Mr. Bouzourou happened to be present, and Mr. Skanzianni called in the Chef du Bureau, Mr. Goyar. I explained everything to Mr. Skanzianni and asked permission to leave. He laughed at me. Mr. Bouzourou was then Chef du Bureau du Personnel. I was not given leave. I stayed in Constantinople for 20 days, asking him every day to transfer me to any branch outside Turkey. They would not do so. Instead of giving me leave they gave me temporary work. On Thursday evening, on coming out of the office, I came across Tewfik Bey who had been Chief of Police at Aidin at that crucial time. He was in mufti. I could not recognise him. He questioned me. I was much perturbed and immediately changed my hotel for fear that he should betray me at any time. On the Friday (28.9.22), the Bank was closed. On the Saturday I went to relate the incident of meeting Tewfik Bey to my Chief. The Chief came late, 9-30 or 10 A.M., so I saw two Sub-Chiefs, Mr. Berturucchi and Mr. Baache. I related to both of them the incident of meeting Tewfik Bey, explained to them the whole affair; and stated that as my life was in danger I wanted to leave at once. There was a ship leaving on the Saturday morning at 10-30 A.M. for Athens. I had told these two gentlemen that I was going to Athens; and I left by this boat."

The respondent reached Athens on 1st October, 1922, and found there Mr. Simmons and most of the Smyrna staff. On

3rd October Mr. Simmons advanced to the respondent his salary for October, but took it back from him in view of a telegram he had received from the Head Office to the effect that the respondent was dismissed, though the ground of dismissal was not then stated.

In a letter of 2nd October, addressed to Mr. Simmons, and letters of 18th October and 15th November addressed to the Head Office, the respondent recounted the circumstances of personal danger which moved him to leave Constantinople, and again requested transfer to a branch outside Turkey. To the Head Office he protested against the dismissal. On 29th November the appellants wrote to the respondent:—

"We can hardly take into consideration the reasons put forward by you to explain your precipitate departure and your dereliction of the service. We would besides remind you that you have behaved in an analogous manner in 1920 when you were at Adana, and your relapse fully justifies the measure of revocation (dismissal) that has been applied in your case. However, we are willing to attenuate that penalty and would ask you to tender your resignation—which would enable us, on receipt of your letter, to consider the possibility of granting you pecuniary assistance. It should nevertheless be understood that this is a mere offer resulting out of extreme benevolence on our part, and that, should the same not be accepted by you, and should your acceptance of same not be notified to us within 25 days from to-day, it should be regarded as null and void."

The respondent declined that offer, and ultimately his name was struck off the list of members of the Bank's staff on 27th January, 1923.

Provision is made for dismissal in Art. 5 of the "Caisse de Pensions et de Retraites" as follows:—

*"La Direction Generale a le droit de revoquer les employees pour faute grave ou abus commis dans leur fonctions, ou pour violation du secret qu'ils doivent garder sur les affaires de la Banque. La Direction Generale est seule juge d'apprecier le caractere de gravite de la faute. Elle a le droit de revocation pour fautes legeres successives et repetees malgre l'avertissement des superieurs."

Under Art. 18 neither an indemnity nor a pension of any other nature is granted to an employee who has been dismissed. Under Art. 19 an employee who resigns has no right to any pension or indemnity, but the Direction Generale have the faculty to grant him an amount not exceeding in capital the amount of the sums retained from his salary. Under Art. 2 a

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**Translation*.—"The General Management have the right to dismiss the employees for a grave fault or abuse committed in the exercise of their duties, or for violation of the secrecy which they most preserve on the Bank's business. The General Management are the only Judge as to the character and gravity of the fault.

The General Management have the right to dismiss for slight faults successively repeated in spite of the warning of the Chiefs:"—K.J.R.

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discharged employee has right to three months' notice and an indemnity borne by the Pension and Superannuation Fund and to be fixed in terms of Art. 21.

It was not disputed by counsel for the appellants that the risk of personal danger which caused the respondent's flight from Constantinople, in disregard of the appellants' repeated refusals to allow him to leave, was real and justified from the point of view of his personal safety, and, in their Lordships' opinion, this is established by the evidence, and, in particular, by that of Roy McLaughlan, an Officer in the Intelligence Department attached to the High Commissioner's Office in Constantinople. He stated that an Armenian who had been condemned by the Turkish authorities to death would be in "an uncomfortable position" there at the end of September, 1922, and that if he had been in the respondent's shoes he would have left Constantinople at the first possible opportunity.

On the contrary, the appellants submitted three contentions, all of which were based on the view that the respondent incurred a permanent personal disability, which incapacitated him from further ability to perform adequately his part of the contract. These contentions were (1) that, as a condition precedent to recovery of damages, the respondent must be in a position to offer implement of the contract on his part, and that the respondent, by reason of his permanent personal disability, was not in such a position; (2) that the supervening incapacity of an employee to perform the services contracted for, was a valid ground for dismissal, even though not founded on at the time of dismissal as a justification; and (3) that by reason of the respondent's permanent personal disability the contract became incapable of further performance, and that accordingly both parties were released from its obligations, thus excluding any action based on breach of contract. This contention was based on the principles to which effect was given in *Horlock* v. *Beal*[1] and cases therein referred to.

It was not seriously maintained by the appellants that their order to the respondent to remain in Constantinople was a lawful order which the respondent was bound to obey at the grave risk of his person. In their Lordships' opinion, the risk to the respondent was such that he was not bound to obey the order, which was, therefore, not a lawful one: *Turner* v. *Mason*[2] per Alderson, B. and per Rolfe, B.

1. (1916) 1 A.C. 486.
2. (1845) 14 M. & W. 112 at 117, 118.

It follows that the respondent's refusal was not "faute grave" such as is necessary to justify dismissal under Art. 5 of the regulations.

Admittedly the respondent undertook by his contract to serve the Bank in Turkey or any of its branches elsewhere, and the contentions of the appellants must all be tested as at the time of dismissal. In their Lordships' opinion, the appellants have failed to establish that at the time of dismissal they were entitled to regard the respondent's disability as a permanent one. In his letter of 2nd October the respondent requested a provisional transfer to one of the agencies outside Turkey "whilst awaiting the end of the present situation." The appellants have not suggested any impossibility of compliance with that request; indeed, they probably never considered it, in the view that they took of the situation.

On the views expressed above that the order to remain in Constantinople was not a lawful order, and that at the time the disability could not be regarded as a permanent one, their Lordships are of opinion that the respondent's offer of service outside Turkey is sufficient to entitle him to pursue the present suit, and that the appellants are equally unable to found on that disability as justification for the dismissal.

The failure of the appellants to establish that the disability had become permanent and that they could not employ him meantime at some place where the disability did not affect him, also disposes of the contention that the contract had become impossible of performance by the time of dismissal.

Accordingly their Lordships are of opinion that the dismissal of the respondent by the appellants was wrongful and that the respondent is entitled to recover damages.

On the question of damages, their Lordships agree with the majority of the learned Judges of the Supreme Court both as to the measure of the damages and the basis on which—for that purpose—the pension to which the respondent would have been entitled is to be calculated. Their Lordships are of opinion that the pension must be calculated, in terms of Art. 14, on the basis of the salary which the respondent in fact received on 31st December, 1922, irrespective of how that salary was arrived at. On that basis parties are agreed that the respondent would have been entitled to a pension of £T.56.375, but their Lordships are of opinion that the rate of conversion for the purposes of a decree in sterling should be the rate current at the time of dismissal instead of that current at the date of

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Lord Thankerton.

the decree; parties are agreed that the former rate should be taken as ·7.20. In the view that their Lordships take of the measure of damages, parties are agreed that the amount of damages should be arrived at by taking the appropriate proportion of the £2,000 awarded by the Trial Judge on this basis, the amount of damages will be £1,378 10*s.* 6*d.*, and the judgment of the Supreme Court will fall to be modified to that extent and the cross-appeal to be allowed for that purpose.

Their Lordships will, therefore, humbly advise His Majesty that the leading appeal should be dismissed with costs and that the cross-appeal should be allowed without any order as to costs.

Solicitors for appellants: *Bischoff, Coxe, Bischoff* and *Thompson.*

Solicitors for respondent: *Hedley Norris & Co.*

K.J.R. ——— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh.]

PRESENT:—LORD ATKIN, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

M. Aditya Prasad .. *Appellant**

v.

Lala Ram Ratan Lal and another .. *Respondents.*

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Aditya Prasad *v.* Lala Ram Ratan Lal.

Transfer of Property Act (IV of 1882), S. 100—Charge on immoveable property—Deed creating—What amounts to—Deed prior to Transfer of Property Act—Provisions of section applicable under head of justice, equity and good conscience to.

In July, 1881, plaintiff's predecessor-in-title executed a usufructuary mortgage of a village to respondents, on the terms that the mortgagor was to have no power of redemption for a period of 15 years, and that after that he was to pay off the entire mortgage money. The respondents entered into possession, in the ordinary course, of the village.

In November, 1881, the plaintiff's predecessor executed a further document which recited that he had executed a possessory mortgage deed in respect of the whole village, and that he needed a further specified sum, which he had borrowed, and he then stipulated to repay the entire amount of the debt, principal and interest in a lump sum within the period stipulated in the former mortgage deed, namely, within 15 years, and he recited that he had borrowed the money by way of a further debt with interest at a certain rate. The deed then provided: "I shall first pay up this debt, including principal and interest, and thereafter I can redeem the mortgaged village, having paid up the mortgage money. Without the payment of this debt I cannot redeem the mortgaged village." It then provided that he should pay every year the interest on the amount, and if he did not, then he would execute separate bonds each year, bearing interest at the same rate.

*P.C. Appeal No. 30 of 1929. 13th February, 1930.
Oudh Appeal No. 17 of 1928.

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Aditya Prasad *v.* Lala Ram Ratan Lal.

Held, affirming the Court below, that the deed of November, 1881, created a charge upon the village.

When the deed of November, 1881, is looked at, it seems clear that the parties intended that the original village should remain in the possession of the mortgagees until the second debt was paid off, and intended, therefore, that the property should be security for the debt.

S. 100 of the Transfer of Property Act does not apply to a transaction which took place before the date of the Act; but the principles that prevail in those circumstances for determining whether a deed prior to that date did or did not create a charge upon immoveable property are the principles of justice, equity and good conscience which for this purpose may be taken to be identical with the provisions in the Transfer of Property Act.

Appeal No. 30 of 1929 from a decree of the Chief Court of Oudh (Wazir Hasan and Mahomed Raza, JJ.), dated the 31st January, 1928, which varied a decree, which had been passed in a suit for redemption by the Subordinate Judge of Gonda on the 14th April, 1927.

The only question for determination on the present appeal was whether a document of 10th November, 1881 (the material terms of which appear from their Lordships' judgment) created a charge upon immoveable property. Differing from the Subordinate Judge on the construction of the deed, the learned Judges of the Chief Court held that it created a charge both for principal and interest due under it. They summed up their conclusion in the following words:—

"Condition 1 clearly means that the mortgagees will continue to remain in possession also in consideration of this fresh loan, principal and interest both. The mortgagees have, therefore, a lien of possession on the mortgaged property of which they can only be deprived on the discharge of the lien. This conclusion is further strengthened by condition No. 3, which is to the effect that the prior mortgage cannot be redeemed without payment of the debt, principal and interest, that might be found due under the deed of the 10th November, 1881. Nor do we see any justification in the language of the deed for accepting the argument addressed to us on behalf of the plaintiff that the charge or lien is restricted to the principal amount alone. The general rule is that the mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate. We are wholly unable to find anything in the deed in question which would bar the application of the general rule. On the contrary, the preamble, condition No. 1 and condition No. 3, all support the interpretation that the interest stands on the same footing as the principal itself (see the case of *Ganga Ram* v. *Natha Singh*[1])."

From the said decree of the Chief Court, the plaintiff appealed to His Majesty in Council.

Dunne, K.C. and *Wallach* for appellant.

De Gruyther, K.C. and *Dube* for respondents.

1. (1924) L.R. 51 I.A. 377: I.L.R. 5 Lah. 425: 47 M.L.J. 64 (P.C.).

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13th February, 1930. Their Lordships' judgment was delivered by

LORD ATKIN.—This is an appeal from the Chief Court of Oudh, in a redemption suit brought by the appellant against the respondents. The Chief Court had reversed the decision of the Subordinate Judge of Gonda, and the question turns upon whether the plaintiff is obliged, in order to get redemption, to redeem a debt which was created by him by a document in writing of the 10th November, 1881. It appears that the predecessor-in-title of the plaintiff was the Zemindar of the village of Parsapur, and that on the 11th July, 1881, he executed a *usufructuary* mortgage of the village to the respondents for Rs. 5,500, and the terms of the mortgage were that the mortgagor was to have no power of redemption for a period of 15 years; after that he was to pay off the entire mortgage money. The respondents entered into possession, in the ordinary course, of the village.

On the 10th November, 1881, the Zemindar executed a further document, and the question is, whether or not this document created a charge upon the village. It is unnecessary to set it out at length but it recites that he had executed a possessory mortgage deed in respect of the whole village, and that he needed a further sum of Rs. 2,500, which he had borrowed, and he then stipulated to repay the entire amount of the debt, principal and interest in a lump sum within the period stipulated in the former mortgage deed, namely, within 15 years, and he recited that he had borrowed the money by way, according to the correct translation, of a further debt with interest at the rate of Rs. 1-8-0 per cent. per month. The deed then provided: "I shall first pay up this debt, including principal and interest, and thereafter I can redeem the mortgaged village, having paid up the mortgage money. Without the payment of this debt I cannot redeem the mortgaged village." It then provides that he should pay every year the interest on the amount, and if he did not, then he would execute separate bonds each year, bearing interest at the same rate, and then it further stated, which is rather by way of repetition, that he could not pay up the prior mortgage money until he had paid off this debt, principal and interest.

Now, the question is whether that was intended by the parties to give a charge upon the property to the mortgagees for the amount of that debt. The Transfer of Property Act

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does not apply, as this transaction took place in 1881, and the Transfer of Property Act was passed in 1882; but the principles that prevail in those circumstances are the principles of justice, equity and good conscience, and for this purpose their Lordships think, may be taken to be identical with the provisions in the Transfer of Property Act. The only question that the Court had to determine was, whether or not the parties intended that this debt should be charged upon the property.

The Chief Court, reversing the decision of the Subordinate Judge, have held clearly that that was the intention. Their Lordships agree with that decision. It appears to them clear, when the subsequent deed is looked at that the parties intended that the original village should remain in the possession of the mortgagees until the second debt was paid off, and intended, therefore, that the property should be security for the debt.

In these circumstances it appears to their Lordships that the Court below could only come to one conclusion, and that their decision is amply supported by the case of *Janardan Vishnu Kulkarni* v. *Anant Lakshmanshet,*[2] a decision of Sir Lawrence Jenkins, where the facts were almost identical with the facts in this case.

Their Lordships, therefore, will humbly advise His Majesty that this appeal should be dismissed, and that the appellant should pay the costs. The case, however, must be referred back to the Chief Court to extend the time beyond the 31st July, 1928, fixed by their decree, within which the appellant can redeem, and also to take any further accounts of principal, interest and costs.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

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2. (1908) I.L.R. 32 Bom. 386.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice*, MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

Pilla Ramaswami .. *Petitioner** (*Accused*)

v.

President, Taluq Board, Tadepalligudam .. *Respondent* (*Complainant*).

Madras Local Boards Act (*XIV of* 1920), *Ss.* 164 (1) *and* 221—*Encroachment—Proceeding before Magistrate to recover penalty—Plea of no encroachment—Sustainability.*

When a Local Board moves a Magistrate under S. 221 of the Madras Local Boards Act, 1920, to recover a penalty imposed under S. 164 (1) of that Act for alleged encroachment on land belonging to the Board, the defaulting party can plead that there was no encroachment at all, and the Magistrate can go into the question whether the alleged encroachment was true and therefore justified the imposition of the penalty.

Ramachandran Servai v. *President, Union Board, Karaikudi,* (1925) I.L.R. 49 Mad. 888: 49 M.L.J. 356 overruled.

In re *Gopayya,* (1927) I.L.R. 51 Mad. 866: 55 M.L.J. 27 and In re *Raheem Sahib,* (1929) I.L.R. 52 Mad. 714: 57 M.L.J. 317, approved.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment in Mis. Case No. 44 of 1928 on the file of the Court of the 2nd Class Stationary Sub-Magistrate of Tadepalligudam at Pentapadu.

The facts of the case and the circumstances leading to the Reference to the Full Bench are set out in the judgment.

V. Govindarajachari for Petitioner.—In every proceeding under section 164 of the Madras Local Boards Act the first requisite is that the property, in respect of which it is instituted, must be shown to belong to the Local Board. There is no distinction in principle between cases arising under clauses (1) and (3) and cases under clause (2) of section 164. The section should be read with section 221 which contemplates an enquiry and not a summary order by the Magistrate regarding the amount to be recovered. To hold the contrary view will mean that even a genuine dispute between the accused and the Board as regards the character of his occupation cannot be gone into. Reliance was placed on the

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*Cr. Rev. Case No. 894 of 1929.
Cr. Rev. P. No. 862 of 1929. 15th April, 1930.

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observations of Phillips, J., in In re *Gopayya*[1] and the observations of Waller, J., in *Union Board of Paramakudi* v. *Chellasami Tevar*[2] and *Syid Mustapha Saheb* v. *Union Board of Kaveripatnam.*[3] The decision in *Ramachandran Servai* v. *President, Union Board, Karaikudi,*[4] was rightly dissented from in the later case of In re *Raheem Sahib.*[5] The decision in *Rangesa Rao* v. *Swaminatha Aiyar*[6] and *Narayana Aiyar* v. *Subramania Chetty*[7] do not contain any discussion. Reliance was also placed on the unreported judgment in Cr. R.C. No. 1089 of 1928 and In re *M. K. Narayana Aiyangar.*[8] Thus the preponderance of authority is in favour of the view that the Magistrate can go into the question if the encroachment was true.

N. S. Mani for *The Public Prosecutor* on behalf of the Crown. —There is a difference in language between clauses (1) and (3) of section 164 on the one hand and clause (2) on the other. Section 221 applies only to a proceeding under clause (3). The section does not contemplate notice being issued to a party. Refers to section 207 (1) (*c*) of the Madras Local Boards Act.

[*Anantakrishna Aiyar, J.*—The words in section 164 (1) are "vested in or belongs to a Local Board" and not "claimed to be vested in a Local Board."]

If the question of encroachment is gone into the Magistrate will be constituted as a sort of appellate authority over the Local Board. *Ramachandran Servai* v. *President, Union Board, Karaikudi.*[4] There is a distinction between cases where the dispute is as to the amount due and cases where it is contended that the penalty cannot be levied at all.

K. Kameswara Rao for respondent argued on the same lines as the counsel for the Crown.

The Court made the following

ORDER. *Curgenven, J.*—This Criminal Revision Case comes before this Full Bench in the following circumstances. Under sub-sec. (1) of S. 164 of the Madras Local Boards Act, the Taluq Board of Tadepalligudam imposed a penalty of Rs. 50 upon the petitioner in respect of an alleged encroachment in the village of Tadepalligudam. He is said to have erected a shed

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1. (1927) I.L.R. 51 M. 866: 55 M.L.J. 27.
2. (1926) M.W.N. 676.
3. (1926) M.W.N. 678.
4. (1925) I.L.R. 49 M. 888: 49 M.L.J. 356.
5. (1929) I.L.R. 52 M. 714: 57 M.L.J. 317.
6. (1927) 27 L.W. 320.
7. (1926) 39 M.L.T. 205.
8. Cr. R.C. No. 247 of 1929.

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without permission upon ground belonging to the Taluq Board. The petitioner did not pay the penalty and accordingly the matter was referred to the Magistrate's Court under section 221 which provides that, in default of payment of such a sum, it may be levied under the warrant of a Magistrate. At the hearing of the case the point arose whether the Magistrate was competent to go into the question whether the alleged encroachment was true and, therefore, justified the imposition of the penalty; and following certain decisions, the Court came to the conclusion that it was not open to it to enquire into an issue of this character and accordingly although it recorded the evi dence it refused to give an opinion upon the matter and directed that a warrant should issue for the recovery of Rs. 50 together with Rs. 10 as costs. The petitioner thereupon presented this Criminal Revision Case, which came in the first instance before Jackson, J. That learned Judge found that there were conflicting decisions with regard to the question at issue, and, deeming it to be an important point which frequently arises, directed that the matter should be placed before the Chief Justice for orders.

The case-law upon this subject has been laid before us and opens with the case of *Ramachandran Servai* v. *President, Union Board, Karaikudi*[1], decided by Wallace and Devadoss, JJ. They were of the opinion that, if a contention of this kind were allowed to prevail, the Magistrate would be constituted as a sort of appellate authority over the Local Board in the matter of deciding whether or not there had been in fact an encroachment; and they pointed out what inconveniences would arise from such a situation. Nor did they think that the language of section 221 would justify such a construction. This case was followed by Devadoss, J., sitting alone, in *Rangesa Rao* v. *Swaminatha Aiyar*[2] and again by myself in *Narayana Aiyar* v. *Subramania Chetty*[3]. So far as my recollection of that case goes, no cases *contra* were cited before me and, sitting singly, I was of course bound to follow the ruling of a Bench. In the 1926 Madras Weekly Notes volume will be found two succeeding cases, *Union Board, Paramakudi* v. *Chellasami Tevar*[4] and *Syid Mustapha Saheb* v. *Union Board of Kaveripatnam*,[5] decided by Devadoss and Waller, JJ. In the judgments delivered by Waller, J., he was of opinion that under the parallel procedure by which a prosecution is instituted for breach

1. (1925) I.L.R. 49 M. 888: 49 M.L.J. 356.
2. (1927) 27 L.W. 320.
3. (1926) 39 M.L.T. 205.
4. (1926) M.W.N. 676.
5. (1926) M.W.N. 678.

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of the law regarding encroachments and which is provided for in sections 164 (2) and 207 of the Act, it was open to an accused person to raise this question of whether the alleged encroachment was indeed an encroachment or not. But he was of opinion also that anomalous though it might be, when the case came before the Court under section 221 the decision in *Ramachandran Servai* v. *President, Union Board, Karaikudi*[1] was right and should be followed.

The first Bench which seems to have taken a contrary view was in In re *Gopayya*[6], where Phillips and Madhavan Nair, JJ., had to deal with circumstances which gave rise to proceedings under section 221, the petitioner in that case having erected a pandal without the permission of the Union Board. The decision proceeded substantially upon other grounds but both the learned Judges, while acknowledging that this point did not really have to be decided, expressed their inability to follow *Ramachandran Servai* v. *President, Union Board, Karaikudi.*[1] Phillips, J., observes with reference to the alleged inconvenience mentioned by Wallace and Devadoss, JJ., in that decision:

"The anomaly pointed out by Wallace, J., is that such a view would amount to the Magistrate being set up as a final Judge over the Local Board. When, however, it is remembered that the Board has applied to the Magistrate for the recovery of the dues, it is not open to the Magistrate to decide summarily and recover the amount without enquiry; and he must be satisfied before he issues the order that such order is correct. If the offender had been prosecuted under section 219, he would be able to plead that no offence had been committed by him, and therefore on the facts of this case it is difficult to hold that he must be precluded from such a defence because a different form of procedure has been taken against him."

That, in other words, of course, is the anomaly detected by Waller, J., in *Syid Mustapha Saheb* v. *Union Board, Kaveripatnam*[5]. A similar case came before Waller and Pandalai, JJ., in In re *Raheem Sahib*[7] and there, after referring to all the previous decisions, the conclusion was come to that *Ramachandran Servai* v. *President, Union Board, Karaikudi*[1] had been wrongly decided and the view was expressed that a Magistrate should go into the question of the merits of the Board's action before enforcing the payment of the penalty. The same point has been decided in the same sense by Waller and Anantakrishna

1. (1925) I.L.R. 49 M. 888: 49 M.L.J. 356.
5. (1926) M.W.N. 678.
6. (1927) I.L.R. 51 M. 866: 55 M.L.J. 27.
7. (1929) I.L.R. 52 M. 714: 57 M.L.J. 317.

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Aiyar, JJ., in Criminal Revisison Case No. 1089 of 1928. As I have already said, it has not been disputed before us that, where a prosecution has been instituted for failure to comply with the terms of a notice, it is competent to the Court in disposing of the case under section 207 to undertake an enquiry of this character. This has been recently decided by a Bench composed of the learned Chief Justice and Cornish, J., in a case so far unreported, In re *M. K. Narayana Aiyangar,* in Criminal Revision Case No. 247 of 1929.

It appears then that the recent trend of authority has been distinctly in the direction of holding that the nature of an alleged encroachment may be investigated. Mr. Mani, however, for the Crown has asked us to hold on the language of the Act itself that this view of the matter is incorrect. Under section 164 (1) the land which is occupied must be vested in or belong to a Local Board. It is only then that the occupant shall be bound to pay such sum as may be demanded of him by the local authority by way of penalty and, "such sum," the section goes on, "may be recovered in the manner hereinafter provided". This seems clearly to mean that the recovery of the sum must be contingent upon satisfaction of the conditions which the section lays down, namely, that the land must be vested in or belong to a Local Board and accordingly it would be illegal for the Board to levy a penalty in respect of a so-called encroachment upon any land which does not satisfy that condition. Whether or not, however, it is open to the Court which has to enforce this order under section 221 to enquire into whether the land was so vested or not must, of course, depend upon the terms of that section. It may be conceded that they are not very clear. The last sentence of sub-section (1) provides that "the amount or apportionment of any such sum shall in case of dispute be ascertained by such Magistrate". It is possible to give a narrow and also a broad meaning to that direction. But we think that it would be very reasonable to give it the construction which has been adopted by the learned Judges who decided In re *Gopayya*[6], namely, that where the Court has power to decide upon the amount or the apportionment of the sum "it is difficult to understand why it should not be open to it to decide that the amount is nil." It seems undesirable to go into the relative advantages and disadvantages of the two constructions. In the one case it has been suggested

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6. (1927) I.L.R. 51 M. 866: 55 M.L.J. 27.

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that the Magistrate would be converted into a Civil Court if he had to go into the difficult questions of title upon which many of these encroachment cases are founded. On the other hand there is the disadvantage that under section 164 a Local Board may, perhaps without due enquiry, impose and demand a penalty in respect of an alleged encroachment and that, if the power of the Magistrate to enquire into the truth of the prosecution allegations is withheld, the party has no remedy except that of a slow and troublesome civil suit. The clear preponderance of opinion is in favour of the view that the Magistrate has such a power and we are of the opinion that it is the correct view.

In these circumstances, we set aside the order of the Trial Court and remand the case for a finding on the evidence whether the alleged encroachment is true, and for disposal, accordingly. Meanwhile the fine and costs paid, if any, will be refunded.

B.V.V. *Order set aside and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE THIRUVENKATA ACHARIAR.

Mahommadalli Sahib .. *Petitioner** (*Counter-petitioner*)

v.

Abdul Khadir Saheb .. *Respondent* (*Petitioner*).

Mahommad alli Sahib v. Abdul Khadir Saheb.

Specific Relief Act (I of 1877), S. 35—Decree for specific performance —Time fixed for payment—Default—Application for extension—Delay— Power of Court to extend time.

A decree for specific performance directed the payment by the plaintiff of the purchase-money into Court within three weeks from the date of judgment. The plaintiff, however, committed default and applied for extension of time after the expiry of the time allowed by the decree.

Held, the Court had the power to enlarge the time; and the power can be exercised on sufficient cause shown even if the application is made after the date fixed by the decree.

Abdul Shaker Sahib v. *Abdul Rahiman Sahib,* (1922) I.L.R. 46 M. 148: 44 M.L.J. 107 and *Rama Bhatlu* v. *Annayya Bhatlu,* (1925) 49 M.L.J. 152, followed.

Moideen Kuppai v. *Ponnuswami Pillai,* (1914) 1 L.W. 882 and *Gopala Aiyar* v. *Sannasi,* (1915) 3 L.W. 29, considered.

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*C.R.P. No. 1276 of 1925. 18th August, 1927.

Mahommad-alli Sahib v. Abdul Khadir Saheb.

Per Thiruvenkata Achariar, J.—The words 'in the same case' in the last sentence of S. 35, Specific Relief Act (I of 1877), refer to clause (*c*). *Kurpal Hemraj* v. *Shamrao Raghunath,* (1922) I.L.R. 47 Bom. 589, followed.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Additional Subordinate Judge of Masulipatam, dated 4th July, 1925, in Civil Miscellaneous Petition No. 299 of 1925 in Appeal No. 39 of 1923.

N. C. Vijayaraghavachari for petitioner.

P. Satyanarayana for respondent.

The Court delivered the following

Jackson, J.

JUDGMENTS. *Jackson, J.*—The petitioner seeks to revise the order of the Additional Subordinate Judge, Masulipatam, in C.M.P. No. 299 of 1925.

The petitioner was defendant in O.S. No. 308 of 1922 brought by counter-petitioner, the plaintiff, for specific performance of a contract to sell immoveable property. It was decreed against the petitioner that, on counter-petitioner depositing Rs. 300 in three weeks from the date of the decree, the petitioner should execute a sale-deed and put counter-petitioner in possession of the property (Appeal No. 39 of 1923, Additional Subordinate Judge, Masulipatam). The counter-petitioner did not deposit the amount within three weeks and applied after the expiry of that period for extension of time. The learned Additional Subordinate Judge extended the time accordingly and hence this revision petition.

There is clear authority that in suits under the Specific Relief Act where the decree has named as here a time within which payment should be made the Court can extend that period. See *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib.*[1]

It would hardly avail the petitioner in these proceedings to contend that there is equal authority to the contrary. This is not a second appeal and if the Lower Court has applied its mind to the question of law and has followed authority, it cannot be said to have acted illegally or with material irregularity.

The only possible contention is that *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1] is so wrong as to be no authority at all. In that case the learned Judges point out that according to English practice a decree for specific relief is not regarded

1. (1922) I.L.R. 46 M. 148: 44 M.L.J. 107,

Mahommad-alli Sahib *v.* Abdul Khadir Saheb.

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as closed and that the same rule obtains in India is clear from the Act itself. Section 35, Act I of 1877, lays down that the Court may rescind the contract if the purchaser has obtained possession of the property and has made default in payment of the purchase money. Obviously default in payment has not *ipso facto* rescinded the decree. The time fixed may be taken as a general indication of what is reasonable and is not an absolute condition.

This with all respect lays down an eminently sensible rule of procedure (as the Chief Justice observes the contrary view would seem to be absurd) and there is no ruling really to the contrary. In a suit not for specific relief but for recovery of certain property it was held in *Moideen Kuppai* v. *Ponnuswami Pillai*[2] that a Court cannot modify its decree either under section 148 or under section 151, Code of Civil Procedure, which seems to be a salutary rule, but here the question is not one of modification but of interpretation. In *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1] it is held that the decree as it stands admits of the extension of time and there is no necessity to alter it (page 155). In *Gopala Aiyar* v. *Sannasi*[3] a single Judge applied *Moideen Kuppai* v. *Ponnuswami Pillai*[2] to a decree under the Specific Relief Act. *Ramaswami Kone* v. *Sundara Kone*[4] which was also applied merely lays down that a confirming appellate decree does not enlarge the time. These rulings are fully discussed in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1] and *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1] has been followed in *Rama Bhatlu* v. *Annayya Bhatlu*.[5]

The only circumstance which distinguishes the present case is that here the application for extension was made after the expiry of the period, but as the learned Additional Subordinate Judge correctly observes once it is held that time is not essential, it is immaterial whether the application be made before or after the expiry. Whether it has been made within reasonable time is a question of fact to be determined in each case. The learned Judge has found that the delay from October, 1923 to April, 1924, was reasonable.

There is, therefore, no ground for interference and the petition is dismissed with costs.

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1. (1922) I.L.R. 46 M. 148: 44 M.L.J. 107.
2. (1914) 1 L.W. 882.
3. (1915) 3 L.W. 29.
4. (1907) I.L.R. 31 M. 28: 17 M.L.J. 495.
5. (1925) 49 M.L.J. 152.

Mahommad-alli Sahib v. Abdul Khadir Saheb.

Thiruvenkata Achariar, J.

Thiruvenkata Achariar, J.—The applicant before us was the defendant in O.S. No. 308 of 1922 on the file of the District Munsif's Court of Gudivada and the respondent was the plaintiff therein. The suit was for the specific performance of a contract of sale of immoveable properties by the defendant to the plaintiff. The District Munsif dismissed the suit, but on appeal the Additional Subordinate Judge, Masulipatam, passed as follows:—

"That on the appellant (plaintiff) depositing Rs. 300 in three weeks from this date in the Lower Court, the respondent do execute a sale-deed to the appellant in respect of the scheduled site and do put him in possession of the same."

This decree was passed on 30th October, 1923.

The plaintiff failed to deposit the amount within the time allowed by the decree. He deposited the amount only on 7th April, 1924, and filed an application for execution of the decree but it was dismissed on the ground that the payment of the money was not made within the time allowed by the decree. The plaintiff thereupon applied to the Appellate Court which passed the decree to extend the time for payment of the purchase money and that Court has by its order, dated 14th July, 1925, extended the time as prayed.

The defendant has preferred this application for the revision of that order. The grounds on which the application is pressed before us are:

(1) that the Lower Court had no power to enlarge the time for the payment of the purchase money which was allowed by the decree;

(2) that even if it had such a power it could be exercised only if the application for enlargement of time is made before the expiry of the period allowed by the decree;

(3) that in this case there were no sufficient grounds for excusing the delay and extending the time for payment of the purchase money.

As regards the first point the learned Subordinate Judge has on the authority of *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1] held that he had the power to extend the time allowed by the decree for payment of the purchase money. He has also held that such an order can be made even when the application for enlargement of time is made after the expiry of the time allowed by the decree. The case in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1] has been followed by Phillips, J., sitting as a single Judge in *Rama Bhatlu* v. *Annayya Bhatlu*[5] and it clearly supports the order made by the Subordinate Judge.

1. (1922) I.L.R. 46 M. 148: 44 M.L.J. 107.
5. (1925) 49 M.L.J. 152.

Mahommad-alli Sahib *v.* Abdul Khadir Saheb.

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It is contended before us by the learned Vakil for the applicant that the observations made by the learned Judges in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1] dissenting from the view taken in *Moideen Kuppai* v. *Ponnuswami Pillai*[2] and *Gopala Aiyar* v. *Sannasi*[3], which is in favour of the petitioner's contention, are *obiter* as they were made in the appeal itself which was preferred from the decree granting specific performance. The effect of the appeal which was preferred by the defendant in that case against the decree for specific performance passed against him was, it is contended, to re-open the whole case as between the parties and it was competent to the Appellate Court to vary the decree appealed from as regards the time to be allowed to the plaintiff for payment of the purchase money to the defendant and that was the effect of the appellate decree in that case.

The cases reported in *Moideen Kuppai* v. *Ponnuswmi Pillai*[2] and *Gopala Aiyar* v. *Sannasi*[3] are, on the other hand, it is contended, direct authorities for the contrary view, namely, that the provision in the decree as to payment of the money within the time allowed therein is a condition imposed by the decree itself for securing the relief granted, namely the execution of conveyance for the property in plaintiff's favour and the delivery of possession of the property to him and an order extending the time for payment of the purchase money would be really a modification of the decree which can be made only in an appeal preferred against the decree or in an application for review of the decree. There is no doubt as to this contention being supported by the case in *Gopala Aiyar* v. *Sannasi*[3], which is a decision of K. Sriniyasa Aiyangar, J., sitting as a single Judge. In the case reported in *Moideen Kuppai* v. *Ponnuswami Pillai*[2] the decree under consideration does not appear to have been a decree for specific performance, and, therefore, that case does not affect the question nor the case in *Ramaswami Kone* v. *Sundara Kone*[4], in which this question was not raised. We have, therefore, in support of the contention urged by the petitioner's Vakil only the decision of a single Judge in *Gopala Aiyar* v. *Sannasi*[3] and in that case the question was not considered in the light of the provisions enacted in section 35 of the Specific Relief Act which has a material bearing on the question. It may be that the present question did not exactly arise for

1. (1922) I.L.R. 46 M. 148: 44 M.L.J. 107.
2. (1914) 1 L.W. 882.
3. (1915) 3 L.W. 29.
4. (1907) I.L.R. 31 M. 28: 17 M.L.J. 495.

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decision in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1], but the question was fully considered and dealt with by both the learned Judges in that case and their view has been followed by Phillips, J., in *Rama Bhatlu* v. *Annayya Bhatlu*[5], in which the question did arise for decision. The weight of authority, therefore, is decidedly in favour of the view that even in the case of a decree framed like the decree in this case, which I may observe is the form which has been in vogue in such cases the Court which passed the decree has the power to enlarge the time allowed for the payment of the purchase money. There can be no doubt as to the desirability of the Court having such a power. If it has not, its power to render justice in such cases will be seriously crippled.

Turning to section 35 of the Specific Relief Act it will be seen that it deals with three cases enumerated as (*a*) to (*c*) of which case (*c*) alone is relevant to the present question. The section so far as that case is concerned runs as follows:—

"Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely:—

* * * *

(*c*) where a decree for specific performance of a contract of sale, * * * a lease has been made, and the purchaser . . . makes default in payment of the purchase money or other sums which the Court has ordered him to pay.

When the purchaser . . . is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor . . . the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require."

It will be seen that the decree for specific performance of a contract of sale has not the effect of extinguishing the contract of sale by merging it in the decree. On the other hand notwithstanding the decree, the contract of sale is still treated as a subsisting contract and when the purchaser makes default by not paying the purchase money or other sums within the time allowed therefor by the decree it is open to the vendor to have the contract rescinded and he may seek that relief either by a suit of his own or by an application made in the suit in which the decree for specific performance of the contract for the sale of land has already been made and not complied with.

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1. (1922) I.L.R. 46 M. 148: 44 M.L.J. 107.
5. (1925) 49 M.L.J. 152.

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It was argued by the petitioner's Vakil that the words "in the same case" in the last sentence of the section refer only to the case put in the preceding sentence, *i.e.*, the case where the purchaser who has obtained the decree for specific performance is also in possession of the subject-matter of the contract. Apart from authority, I think it is fairly clear that the words "in the same case" in the last clause of the section refer to case (*c*) and it has also been so held in *Kurpal Hemraj* v. *Shamrao Raghunath.*[6] There is no reason for confining the summary remedy provided in the last clause to those cases where the purchaser who has obtained a decree for specific performance is also in possession of the property to which it relates. In the present case, therefore, it was open to the respondent to apply for the rescission of the contract on account of the default made by the applicant in payment of the purchase money. Upon such an application the Court may order either the immediate rescission of the contract if it considers that the purchaser has already had sufficient time and has made wilful default or it may grant further time peremptorily for payment of the purchase money and in case of default order rescission of the contract. *See* Fry on Specific Performance, 6th Ed., section 1173. On ordering a rescission of the contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require. *See* section 38 of the Specific Relief Act. It follows from this that the right to enforce the decree is not extinguished unless and until a final order is made rescinding the contract. And as the Court has got the power to condone the default when the vendor applies for a rescission of the contract it would be anomalous to hold that it has not that power when no such application has yet been made.

It is argued that as there is no statutory provision for enlargement of time for payment of the purchase money as there is in the case of decrees for payment of mortgage money, such a power cannot be implied. This argument will have some force if there was any statutory provision as to what a decree for specific performance of the sale of land should contain and there was in it no provision for enlargement of time. But as the matter has not been dealt with at all, the argument has no force, specific performance being an equitable remedy, it should be presumed that the Court here were left to be guided by long-established practice of the Courts of Equity in England which

6. (1922) I.L.R. 47 B. 589.

Mahommad-alli Sahib v. Abdul Khadir Saheb. — Thiruvenkata Achariar, J.

have been administering that relief. I am, therefore, of opinion that the contention that the Court has no power to enlarge the time for the payment of the purchase money was rightly overruled.

As regards the second point, I am of opinion that the power to enlarge the time originally granted may be exercised from time to time on sufficient cause being shown and the Court may do so even if the application for enlargement of time is made after the expiry of the period already granted.

As regards the question whether there was no sufficient cause to excuse the delay and to grant further time in the present case, that is a question relating to the merits of the case and even if it has been wrongly decided, we cannot interfere with the learned Judge's decision on that point in revision.

The petition is dismissed with costs.

S.R. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Nanchappa Goundan and others .. *Appellants** (*Defendants*)

v.

Vatasari Ittichathara Mannadiar .. *Respondent* (*Plaintiff*).

Nanchappa Goundan v. Ittichathara Mannadiar.

Interest—Improvement lease—Rent payable depending on future contingent event—Time depending on Government assessing lands to revenue —Suit to recover arrears of rent—Claim for interest on rent decreed—Interest Act (XXXII of 1839)—Applicability—Doctrine of equitable grounds for awarding interest—Interest whether recoverable by way of damages—Contract Act, 1872, S. 73, Ill. (n)—Rent charged on land—Different rule regarding interest.

An improvement lease, under which waste lands were to be gradually brought under cultivation, provided that the tenant should pay rent at a certain rate from the year in which the lands were in future assessed to Government revenue. The landlord instituted a suit to recover the arrears of rent, which accrued under the lease deed, together with interest thereon. The claim in respect of rent having been decreed,

Held; the plaintiff was not entitled to interest under the Interest Act, 1839, on the arrears of rent decreed to him, because neither the sum nor the time was certain within the meaning of that Act.

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*L.P.As. Nos. 255 to 258 of 1925. 4th September, 1929.

Juggomohun Ghose v. *Manickchund,* (1859) 7 M.I.A. 263 and *Maine and New Brunswick Electrical Power Co.* v. *Hart,* (1929) A.C. 631, relied on.

Held, further, that the plaintiff was not entitled to recover interest apart from the Interest Act, either on general equitable grounds or by way of damages under S. 73, Ill. (*n*) of the Contract Act.

Doctrine of "equitable grounds" for awarding interest discussed.

Per Madhavan Nair, J.—As regards a party's claim to interest, apart from the Interest Act, the law in India may be taken to be the same as in England. The Interest Act is exhaustive and only such equitable grounds as were recognised in Courts of Equity can be relied on in awarding interest on equitable grounds.

Kamalammal v. *Peeru Meera Lavvai Rowthen,* (1897) I.L.R. 20 Mad. 481: 7 M.L.J. 263, followed.

Abdul Saffur Rowther v. *Hamida Bivi Ammal,* (1919) I.L.R. 42 Mad. 661: 36 M.L.J. 456, dissented from.

Miller v. *Barlow,* (1871) L.R. 3 P.C. App. 733: 8 Moo. (N.S.) 127 and *London, Chatham and Dover Railway Co.* v. *The South Eastern Railway Co.,* (1893) A.C. 429, referred to.

Where, however, under the lease deed, rent is charged on the leased properties or on other properties belonging to the lessee, the landlord will be entitled to recover interest on the arrears of rent, although there are no words allowing interest in the lease deed itself.

Drax, In re. *Savile* v. *Drax,* (1903) 1 Ch. 781, followed.

Appeals under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Phillips in Second Appeals Nos. 137 and 138 of 1922 and 1411 and 1412 of 1921, preferred against the decrees of the District Court of South Malabar in Appeal Suits Nos. 866, 846, 858 and 859 of 1920, preferred against the decrees of the Court of the Principal District Munsif of Palghat in Original Suits Nos. 65 of 1915 and 60, 61 and 63 of 1918 respectively.

B. Sitarama Rao and *P. S. Narayanaswami Aiyar* for appellants.

T. R. Venkatarama Sastri and *T. B. Balagopalan* for respondent.

The Court delivered the following

JUDGMENTS. *Venkatasubba Rao, J.*—This is a Letters Patent Appeal from the judgment of Mr. Justice Phillips. The question raised is whether the defendants are liable to pay interest on the rent due by them under a written lease. The learned Judge has held that the Interest Act (XXXII of 1839) is not applicable but that interest is nevertheless payable on general equitable grounds. The case has been argued fully on both

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sides and numerous authorities have been cited. To my mind, the case presents no difficulty, although the state of the law is not satisfactory, and I shall briefly deal with the points raised without burdening my judgment with needless citation of cases.

The effect of the lease deed is thus stated in the judgment of Mr. Justice Phillips:

"It is clear from the terms of the document that the payment of rent to the plaintiff is to commence as soon as the lands are assessed. The lease is an improvement lease under which the lands are to be gradually brought under cultivation and until they are so brought under cultivation nothing would be payable either to the Government or to the jenmi."

Again, the learned Judge refers to a clause in the lease,

"Under which the tenant agrees to pay, from the year in which Government revenue is paid, rent at the rate of three-fourth of a para for one para seed area."

It is not disputed that these passages correctly represent the effect of the document. The question then arises, does the Interest Act apply?

I leave out the words which are not relevant for the present purpose and reproduce that part of the Act with which we are concerned.

"It is, therefore, hereby enacted that, upon all debts or sums certain payable at a certain time, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable if such debts or sums be payable by virtue of some written instrument at a certain time, provided that interest shall be payable in all cases in which it is now payable by law."

The question then is, *is the sum certain and is the time certain?* Mr. Venkatarama Sastriar has contended that under the instrument, both the sum and the time should in the eye of the law be deemed to be certain. This contention cannot prevail in view of the authorities by which we are bound. In fact, the argument of the learned Advocate is precisely that which was adopted in the case of *Duncombe* v. *Brighton Club and Norfolk Hotel Co.*[1] A different view had been taken by the Exchequer Chamber in the earlier case of *Merchant Shipping Co.* v. *Armitage*[2]. In the last- mentioned case, the Court came to the conclusion,

"That where a sum of money was payable under a charterparty after the right delivery of the cargo, in cash two months after the date of the

1. (1875) L.R. 10 Q.B. 371. 2. (1873) L.R. 9 Q.B. 99 at 114.

ship's report inwards at the custom house, although the time was ascertained and became settled by the event, the money was not payable at a 'time certain' within the meaning of the statute."

In the former case, the majority of the Court came to the conclusion

"that although you had not the sum or the time actually mentioned in the written instrument, yet if the written instrument contained provisions which on the happening of an event rendered the time or the sum certain, that was sufficient within the meaning of the statute, and interest could be allowed."

It is in the words of Lord Herschell that I have stated above the effect of the two decisions to which I have referred; see *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*[3] Having quoted these cases, the learned Lord, though disposed to treat the *Armitage case* as of greater weight, refuses to express any decided opinion as to which of these views is the correct one. Lord Morris feels no doubt that the law is correctly stated in the *Armitage case* (see p. 442). But Lord Shand observes that the *Duncombe case* appeals more forcibly to his mind than the other case. We are not concerned with this conflict, for the Indian Courts are bound by the law settled beyond doubt, by two Privy Council cases, one of them being a very recent one. In *Maine and New Brunswick Electrical Power Co.* v. *Hart*[4] (a case, the facts of which closely resemble the facts before us), the following passage contains a very clear statement of the law:—

"It is further to be observed that in *Juggomohun Ghose* v. *Manickchund*[5] their Lordships' Board held under an Indian Statute (Act XXXII of 1839) identical in terms with the relevant section of Lord Tenterden's Act, that a sum certain is not payable by the written instrument at a time certain if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for the happening of those events, if they ever do happen, may be indefinitely postponed."

Judged by this test, in the present case, neither the sum nor the time is certain.

In re *Horner, Fooks* v. *Horner*[6] is not inconsistent with this principle, for the contingency there mentioned was the death of a certain person and "death is not a contingent event—it is a certainty which must happen to all."

The sum was there payable within six calendar months after the testator's decease.

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3. (1893) A.C. 429 at 435. 4. (1929) A.C. 631.
5. (1859) 7 M.I.A. 263. 6. (1896) 2 Ch. D. 188.

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"A covenant to pay within six calendar months after death, is a covenant to pay on the last day of the six months."

This case does not, therefore, help Mr. Venkatarama Sastri.

It is difficult to reconcile *Surja Narain* v. *Pratap Narain*[7] with the decision of the Privy Council. In that case, a specified sum was agreed to be paid in the event of counsel being engaged. The learned Judges treated the time of payment as being certain, a view opposed to that taken in the two decisions of the Judicial Committee.

I agree with Mr. Justice Phillips that a case has not arisen which gives the Court jurisdiction to allow interest under the Act.

The question then arises, are the defendants liable for interest independently of the Act? In other words, is interest payable under the proviso above quoted, which says "interest shall be payable in all cases in which it is now payable by law?" Before Lord Tenterden's Act, interest was payable at common law and in equity in certain cases. The object of that Act was to make the law more liberal by statute in regard to the granting of interest. (See the judgment of Lord Watson in *London, Chatham and Dover Railway Co*. v. *South Eastern Railway Co.*[3]) To carry out this object, a proviso was added, leaving untouched those cases in which there was already a right to interest when the Act was passed. The Indian Act, as its preamble shows, reproduces for this country the terms of Lord Tenterden's Act. What then are the cases which are saved by the proviso? Lord Lindley in his judgment in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*[8] attempts to state in what cases, before the Act, interest was granted first at common law and secondly in equity. The judgment does not, of course, profess to be exhaustive on the point, but the leading considerations are set forth in some detail. The learned Lord Justice refers to cases where a plaintiff for asserting his *legal* rights had to invoke the powers of the *Court of Chancery* and points out that that Court generally followed *the law in dealing with legal claims*. Such cases are those dealt with under the concurrent jurisdiction of the Court of Equity. Then the Lord Justice refers to purely equitable rights which fell within the exclusive jurisdiction of that Court. He

3. (1893) A.C. 429 at 441.
7. (1899) I.L.R. 26 C. 955.
8. (1892) 1 Ch. 120 (C.A.).

thus mentions instances where interest was awarded before the statute at common law as well as in equity. Though, as I have just stated, the Court of Equity followed the law in dealing purely with legal claims, sometimes in order to prevent injustice, it applied to such claims principles such as,

"A Court of Equity will treat a wrong-doer as having done that which he ought to have done."

This then is the effect of Lord Lindley's judgment. Bearing this in mind, let us examine the contentions now advanced. When it is sought to bring a case within the proviso, the question that really arises is, would interest have been granted in such a case before the Act either at law or in equity? It is unnecessary to make a complete list of instances where interest was so awarded. It is sufficient to point out that before the Act, in the case of ordinary debts, interest was not payable at common law unless there was an agreement express or it could be implied as in the case of usage. (See the judgment of Lindley, L.J., at page 140 and the judgment of Bowen, L.J., at page 146.) Vague notions as to what are equitable principles have led to some confusion; and a rule may vaguely be just, but it is not necessarily a principle of equity. This distinction is most clearly brought out in the judgment of Lord Herschell in the House of Lords in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*[3], already cited. The Courts at one time granted interest in cases of debts on general grounds of justice; for example, in one case Lord Mansfield held that a debt carried interest where there was "long delay under vexatious and oppressive circumstances". In another case, Best, C.J., observed that the Jury might give interest "in the shape of damages for the unjust detention of the money''. This view of the law was not approved in later cases and interest was refused in cases of debts on any such broad equitable grounds. It was with the object of relaxing this law by statute, that Lord Tenterden's Act was passed. But the new rights created under that Act were within very narrow limits—too narrow indeed, as is pointed out by Lord Herschell, for the purposes of justice. Lord Shand similarly regrets that the law, as it stands, allows injustice to prevail.

I have now dealt with the principles that guide the Courts in England. Is the law of this country different? That would

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3. (1893) A.C. 429.

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depend upon what the law was before the passing of the Interest Act. Cases, where before the Act interest was granted, are saved by the proviso in question. But there is no warrant for saying that the Courts awarded interest on debts on grounds such as were adverted to by Lord Mansfield and Best, C.J. The subject is fully and clearly dealt with in the judgment of Sir John Wallis, C.J., in *Rajah of Pittapur* v. *Ballapragada Pallamraju.*[9] The Madras cases on which Mr. Justice Phillips relies must, with all respect, be held to be wrong. The learned Judge also refers to *Miller* v. *Barlow.*[10] That is not a case of a debt at all. But as it is strongly relied on by him, it requires a closer examination. That was an action for money had and received. A firm was adjudicated insolvent and the Official Assignee impeached a certain transaction which the insolvent firm had with the plaintiff. He then obtained an order from the Insolvency Court directing the plaintiff to hand over to him certain goods and monies. They were accordingly handed over. In the action that was brought, the plaintiff complained that the order was wrongly made and prayed for a declaration of his rights in the aforesaid goods and money. The question was, "Was the Official Assignee liable to pay interest?" The effect of the judgment in the suit was that the order of the Insolvency Court was wrongly made. The money having been retained in the Official Assignee's hand by virtue of an order which was subsequently reversed, their Lordships held that the plaintiff was entitled to interest. The principle underlying this decision is further elucidated by another judgment delivered in the same year by the Privy Council in *Rodger* v. *The Comptoir D'Escompte de Paris.*[11] The question directly arose in that case, whether, on the reversal of a judgment, a party is entitled to get interest on the amount that had been recovered from him under that wrong judgment. It was held that he was. These cases give effect to definite and well-recognised rules of equity. They have never been treated as authorities, in English Courts, for the position that interest can be allowed on a debt, on what are termed general equitable grounds.

The Privy Council case of *Maine and New Brunswick Electrical Power Co.* v. *Hart,*[4] to which I have already referred, is a decisive authority also on this point. The facts there, as I have said, are very similar to the facts of the present case. Their

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4. (1929) A.C. 631.
9. (1920) 40 M.L.J. 18.
10. (1871) L.R. 3 P.C. 733.
11. (1871) L.R. 3 P.C. 465.

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Lordships, after disposing of the contention that interest was payable under the statute, further held:

"There is no place in the matter for the exercise of equitable jurisdiction and, therefore, no rule of equity in regard to interest can have any application."

I am, therefore, clearly of the opinion that, under the proviso, the plaintiffs cannot claim interest on what are known as general equitable grounds.

Lastly, interest is claimed on the ground that it may be granted by way of damages under section 73 of the Indian Contract Act. This contention again is one which has been repeatedly overruled. In the judgment of the Court of Appeal of Lindley, L.J., already referred to, it is expressly laid down that damages cannot be granted for non-payment of debts. The question is directly raised by Lord Herschell in the House of Lords—Can interest be awarded by way of damages on the ground of wrongful detention of the debt? The question was, after full discussion, answered in the negative. Section 73 is merely declaratory of the common law as to damages. (*See* Pollock and Mulla's Commentaries on the Indian Contract Act.) If the English rule as to damages has not had the effect of superseding Lord Tenterden's Act in regard to interest on debts, why should it be assumed that section 73 of the Contract Act has produced just the contrary result? I am not prepared to hold that the Legislature, by adding illustration (*n*) to section 73, intended to depart from the law which must be treated as having been settled beyond doubt. The view I take is in conformity with several cases, of which *Kamalammal* v. *Peeru Meera Lavvai Rowthen*[12] may be taken as typical. I cannot, therefore, uphold the contention of Mr. Venkatarama Sastri.

In the result, the claim to interest is disallowed except as regards what is claimed in O.S. No. 65 of 1915 (S.A. No. 137 of 1922). In that case a special contention is put forward that, the rent being charged on land, interest becomes payable. This is taken to be settled law. See *Drax*, In re; *Savile* v. *Drax*[13]. Collins, M.R., thus observed:

"It seems to me to be well established on the authorities, and the result of those authorities does not indeed appear to be disputed, that a Court of Equity has power to give interest, and in point of fact does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge" (page 793).

Mr. Sitarama Rao has not contested this proposition. In O.S. No. 65 of 1915, the judgment of Mr. Justice Phillips is

12. (1897) I.L.R. 20 M. 481: 7 M.L.J. 263.
13. (1903) 1 Ch. 781.

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affirmed and the appeal is dismissed with costs. In the other cases, the learned Judge's judgment is set aside and the appeals are allowed with costs.

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Madhavan Nair, J.—The defendants are the appellants. They are lessees of the plaintiff holding lands under perpetual lease deeds, the terms of which in respect to material particulars are alike in all cases except in Letters Patent Appeal No. 255 of 1925, which will be referred to later. Under the lease deeds, waste lands were leased out on condition that rent should be paid on "reclamations" as they are made. The marupat of the lease in L.P.A. No. 258 of 1925, Exhibit A, may be taken as typical to show the terms under which the lessees held their lands. Its main terms, so far as these are relevant for these Letters Patent Appeals, are as follows:—

"........... the remaining sthalams ..... shall be held and be held as saswatham (permanently) without surrendering the same for ever and enjoyed by me and my sons and grandsons for ever and ever in hereditary succession, and a proportionate pattom (rent) at the rate of 3|4th of a para of paddy for one para of the Nadan seed, will be paid by me to you from the year in which the assessment in levied by the Government."

The suits out of which these Letters Patent Appeals arise were instituted by the plaintiff for the recovery of arrears of rent together with "interest" on the arrears. The District Munsif gave decrees to the plaintiff for the arrears claimed and also for the "interest" on such arrears. On appeal the District Judge disallowed the "interest" on the ground that such interest was not claimable under the Interest Act (XXXII of 1839). In the Second Appeals filed by the plaintiff, Phillips, J., though he agreed with the District Judge that the Interest Act did not apply to these cases, reversed his decisions and held that the plaintiff was entitled to claim interest "on equitable principles". The learned Judge relied mainly on *Miller* v. *Barlow*[13] and the decision in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14] in support of his conclusion.

The short question for determination in these Letters Patent Appeals is whether the plaintiff is entitled to claim "interest" on the arrears of rent decreed to him. The respondent supports the judgment of Phillips, J., not only on the ground of "equitable principles" on which he has based his decision but also on two additional grounds, namely, that interest can be claimed under the Interest Act and also under section 73 of

13. (1871) L.R. 3 P.C. 733.
14. (1919) I.L.R. 42 M. 661: 36 M.L.J. 456.

the Indian Contract Act. The appellants argue that none of these grounds affords any justification for awarding "interest".

I shall first deal with the arguments based upon "equitable principles." To understand the operation of these principles in relation to the law awarding "interest" it is necessary to consider whether they were given effect to generally in all cases on grounds of equity and good conscience or whether their application was strictly limited to any special class of cases. At common law in England "interest" was not payable on debts unless by agreement or by mercantile usage, nor could damages be given for non-payment of such debts. The law in this respect was altered by 3 and 4 Will. IV, c. 42 (which corresponds to the Interest Act, XXXII of 1839). In *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*[8], the leading decision on the subject, the law was thus stated by Lindley, L.J.:

> "As regards interest it was settled by *Higgins* v. *Sargent*[15], *Page* v. *Newman*[16] and *Foster* v. *Weston*[17], that at common law interest was not payable on ordinary debts unless by agreement or by mercantile usage; nor could damages be given for non-payment of such debts. The law in this respect was altered by 3 and 4 Will. IV, c. 42" (page 140). . . . . . "Except as altered by the Act, the 3 and 4 Will. IV, c. 42, the old law as to interest remains the same" (page 142).

This decision was affirmed by the House of Lords in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*[3] According to this decision, under the English Law "interest" is not payable on debts nor could damages be given except in three cases—

1. Where there is an agreement to pay interest;
2. Where it is payable under the mercantile usage; and
3. Where it is payable under the statute.

To this may be added a fourth case:—Certain other actions in which also Courts of Common Law gave interest by way of damages, as for example, for breach of contract to give a bill of exchange, which, if given, would carry interest (*see* the judgment of Kay, L.J., at page 151). Before the Judicature Act, some cases in connection with debts, etc., where the question of "interest" was involved, ordinarily triable in Courts of Common Law, were tried in the Court of Chancery as the plaintiff's right in such cases could not be enforced at law owing to the defective legal

3. (1893) A.C. 429.
8. (1892) 1 Ch. 120 (C.A.).
15. (1823) 2 B. & C. 348: 107 E.R. 414.
16. (1829) 9 B. & C. 378: 109 E.R. 140.
17. (1830) 6 Bing. 709: 130 E.R. 1454.

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machinery. "The Court of Chancery followed the law in dealing with legal claims." In cases of purely *equitable demands*, for instance, in suits against trustees, who misapplied trust moneys and in suits for equitable waste, the Court of Chancery usually decreed interest (*see* the observations of Lord Lindley at page 142). The cases in which interest is payable by the *rules of equity* are thus described in Halsbury's Laws of England, Vol. XXI, page 40—

1. Money obtained by fraud and retained by fraud can be recovered with interest;

2. Interest may also be recovered in equity in some cases where a particular relationship exists between the creditor and debtor, such as mortgagor and mortgagee, obligor and obligee on a bond, executor and beneficiary, principal and agent, principal and surety, trustee and *cestui que trust*, vendor and purchaser, or in the case of arrears of annuities;

3. Where a person who is an officer of the Court, such as a sheriff, a solicitor or a receiver, wrongfully withholds money which he has obtained in the course of legal proceedings, he may be ordered to pay it with interest.

So, unless a claim for "interest" on "debts" fell within any one of the above seven cases—assuming that the classification is exhaustive, for it is possible that further research may disclose more cases in "equity"—including in this number the four cases under "the common law" already mentioned, interest was not awarded under English Law. No authority has been cited to show that the abolition of the distinction between Courts of Common Law and Equity and their fusion by the Judicature Act resulted in enlarging the scope of cases in which interest could be claimed on debts or in increasing the power of Courts in awarding "interest". As a result of the fusion, the same Court was enabled to deal with "legal" as well as "equitable claims" and to award interest on "equitable principles" as well. The same Court being a Court of Law and Equity recognised not only "legal" claims to interest but also gave effect to such "equitable" constructions as would be recognised in Courts of Equity only.

As regards a party's claim to interest, apart from the Interest Act, the law in India may be taken to be the same as in England [see *Kamalammal* v. *Peeru Meera Lavvai Rowthen*[12] and *Juggomohun Ghose* v. *Kasiree Chund*[18]]. I shall now consi-

12. (1897) I.L.R. 20 M. 481: 7 M.L.J. 263.
18. (1862) 9 M.I.A. 256 at 260.

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der how far the principles referred to above and given effect to by English Courts have been followed in the decisions of this Court. As numerous cases were discussed in detail before us and as the case was very fully argued by both sides, a consideration of the case-law at some length becomes necessary. From 1863, that is, *Kisara Rukkumma Rao* v. *Cripati Viyanna Dikshatulu*[19], onwards, the decisions of our Court proceeded on the view that interest not payable under the terms of the contract could only be paid under the Act or as being in accordance with the usage as to the particular class of instruments. [See *Kamalammal* v. *Peeru Meera Lavvai Rowthen*,[12] *Subramania Aiyar* v. *Subramania Aiyar*,[20] *Gopalaswami Chettiar* v. *Ramier*[21] and *Nanu Nair* v. *Ashtamoorthi Nambudripad*.[22]]

In 1919, in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14], Ayling and Seshagiri Aiyar, JJ., for the first time held that the Interest Act is not exhaustive of all cases where interest is allowed and that even in cases where payment of interest is not justified under the Interest Act interest may be allowed on "equitable principles". In so doing they mainly relied upon the decision in *Miller* v. *Barlow*[10] in which the Judicial Committee pointed out that Indian Courts are Courts both of Law and Equity and that they can award as damages "interest" on equitable grounds. They also referred to the decisions of the Privy Council in *Hurropersaud Roy* v. *Shama Persaud Roy*,[23] *Hamira Bibi* v. *Zubaida Bibi*[24] and *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*[25] and also to some decisions of the other High Courts in which interest was allowed apart from the Act. Though Seshagiri Aiyar, J., who delivered the judgment in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14], expressed this view, it may be noticed that it is not consistent with the view in *Nanu Nair* v. *Ashtamoorthi Nambudripad*[22], to which he was a party and also with the subsequent decision in *Rajah of Pittapur* v. *Ballapragada Pallamraju*,[9] to which also he was a party. In that case Sir John Wallis, C.J., followed the prior decisions of this Court and declined to award interest apart from the provisions of the Act. The learned Judge dis-

9. (1920) 40 M.L.J. 18. 10. (1871) L.R. 3 P.C. 733.
12. (1897) I.L.R. 20 M. 481: 7 M.L.J. 263.
14. (1919) I.L.R. 42 M. 661: 36 M.L.J. 456.
19. (1863) 1 M.H.C.R. 369.
20. (1908) I.L.R. 31 M. 250: 18 M.L.J. 245.
21. (1909) 7 M.L.T. 108. 22. (1915) 29 M.L.J. 772.
23. (1878) L.R. 5 I.A. 31: I.L.R. 3 C. 654 (P.C.).
24. (1916) L.R. 43 I.A. 294: I.L.R. 38 A. 581: 31 M.L.J. 799 (P.C.).
25. (1915) L.R. 42 I.A. 91: I.L.R. 42 C. 914: 29 M. L.J. 70 (P.C.).

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tinguished the case in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14] by pointing out that that was not a case of a contract and also observed, in the course of his judgment, that cases in which interest was allowed by the Privy Council in the absence of a contract and independently of the Act must be regarded as cases coming within the proviso to the Act, saving cases in which interest was payable by law when the Act was passed. Seshagiri Aiyar, J., who delivered a separate judgment agreed with the conclusion arrived at by the learned Chief Justice and pointed out that he and the other learned Judge in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14] did not differ from the prior decisions of this Court.

The view that interest might be awarded apart from the Act on broad equitable considerations first adumbrated in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14], gradually began to find favour in this Court and that decision has been followed in three cases, namely, *Arunachalam Chettiar* v. *Raja Rajeswara Sethupathi*[26], by Oldfield and Krishnan, JJ., *Venkatachalam Chettiar* v. *Ponnuswami Aiyangar*[27], by Wallace, J., and *Krishnan Nambudripad* v. *Ambu Kurup*[28], by Curgenven, J. It is not necessary to refer to the facts of these cases, as I shall presently consider how far and to what extent the cases relied on by Seshagiri Aiyar, J., in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14] support the conclusion that apart from the Act, interest can be awarded on equitable considerations. Before proceeding further I may here state, to make the position clear, that so far as the point under discussion is concerned, if the true nature and scope of the equitable considerations affecting the award of interest is correctly understood, the question whether the Interest Act is exhaustive or not, is not in itself a very important one, for, the cases in which "interest" could be awarded on equitable considerations may be brought within the proviso of the Interest Act, as observed by Wallis, C.J., in which view the Interest Act may be said to be exhaustive, or those cases may be treated as a separate class of cases not coming within the Act strictly, in which view the Act will not be exhaustive. However that may be, the important question to consider is to what extent do equitable considerations afford justification for decreeing "interest".

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14. (1919) I.L.R. 42 M. 661: 36 M.L.J. 456.
26. (1921) 42 M.L.J. 74.
27. (1924) 47 M.L.J. 312.
28. (1926) 51 M.L.J. 633.

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The main case relied on in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14], and which was referred to in the present case also with great insistence is the decision in *Miller* v. *Barlow*.[10] The facts of the case, which it may be observed is not one of contract, are somewhat complicated, but the head-note states them sufficiently to enable us to understand the scope of the decision so far as it relates to the point under discussion.

"Proceedings were taken under the Insolvency Act, 11 and 12 Vic., c. 21, and the proceeds of certain goods claimed by the Official Assignee, paid by the Assignee into the Bank of Bengal. In a suit brought in the High Court at Calcutta, by *A* against the Official Assignee, claiming the proceeds of the goods paid into the Insolvent Court:—*Held,* on the Court making a decree in favour of the plaintiff, that the High Court being a Court of Law and Equity, had power to award interest on the amount, as against the Official Assignee."

On the facts the learned Judges came to the conclusion that "by the wrongful act of the defendant, the plaintiff has been deprived of the money which was actually making interest." After observing thus, their Lordships proceed as follows:—

"Their Lordships are of opinion, that under these circumstances a Court of Equity would clearly be entitled to give interest; and it is by no means clear that even in a Court of Law, although the ordinary rule is that in actions for money had and received interest is not given, the fact of the defendant having received interest would not be a sufficient ground for making the defendant liable to pay interest; and as the High Court have the powers both of a Court of Equity and a Court of Law, their Lordships are of opinion that interest has been properly given".

These observations make it clear that their Lordships never intended by this decision to lay down a general rule that interest may be awarded in all cases on account of equitable considerations; for they draw our attention to the special circumstance that "by the wrongful act of the defendant the plaintiff was deprived of money which was actually making interest" and they state also that in such circumstances a Court of Equity certainly, and even a Court of Law departing from its usual rule would probably, award interest. In this connection it is important to note that in cases of this kind, where Officers of the Court withhold money they have wrongfully obtained in the course of legal proceedings, interest was always made payable by the rules of equity. The case we are dealing with falls within the last class of cases mentioned in Halsbury, Vol. XXI, page 40, already referred to, where interest is payable by the rules of equity. Courts of Equity having been accustomed to

10. (1871) L.R. 3 P.C. 733.
14. (1919) I.L.R. 42 M. 661: 36 M.L.J. 456.

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give relief in such cases, their Lordships state that Indian Courts, being Courts of Equity as well as Courts of Law, may properly award interest. When we propose to apply equitable considerations in deciding the question whether a party may be awarded interest we have to ask ourselves the question whether a Court of Equity in such a case would usually award interest and unless a particular case falls within the well-recognised class of cases in which interest is demandable in equity, the Indian Courts, in my view, have no power to award interest in such a case on equitable grounds. If the case is one in which Courts of Equity would ordinarily award interest, then, Courts of Law in this country, having the powers both of the Courts of Equity and of Law, can also award interest on equitable considerations. This seems to me to be the true scope of the decision in *Miller* v. *Barlow*[10] and understood in this light it is clear that that decision cannot be relied upon in support of the view that the plaintiff is entitled to interest in this case on broad equitable grounds; for, it is not shown that the nature of the claim made by the plaintiff is one which will bring the suit within the purview of a Court of Equity in which it will award interest. In a very recent case, on appeal from the Supreme Court of New Brunswick (see *Maine and New Brunswick Electrical Power Co.* v. *Hart*[4], which will be referred to later on in connection with the Interest Act also) their Lordships of the Privy Council had to consider whether any rule of equity entitles the plaintiff to interest and in considering that question they state the rule thus:

"In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance.

It must, however, be borne in mind that when once such a contract has been executed, then, apart from cases where rescission on the ground of fraud is sought, there remains nothing to attract the equitable jurisdiction, and the parties are left to their remedies at law."

Applying this principle to the case before them, their Lordships held that, where covenants between the parties when construed according to the ordinary rules of construction do not give the plaintiff interest, he cannot claim interest, unless it is given to him at common law or under Statute and apart from the case where rescission of payment on the ground of fraud is sought there is no place in the matter for the exercise of equitable jurisdiction, and, therefore, no rule of equity in regard to interest can have any application.

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4. (1929) A.C. 631 at 640. 10. (1871) L.R. 3 P.C. 733.

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As the plaintiff, to use the language of their Lordships of the Privy Council, "has not established in this case the existence of a state of circumstances which attracts the equitable jurisdiction," I think he is not entitled to interest "on equitable grounds".

I shall now briefly consider the other Privy Council cases referred to by Seshagiri Aiyar, J., in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14] in support of his decision, namely, *Hurropersaud Roy* v. *Shama Persaud Roy*[23] and *Hamira Bibi* v. *Zubaida Bibi*[24] and *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*[25]. In *Hurropersaud Roy* v. *Shama Persaud Roy*[23] interest was allowed on mesne profits. This decision, as explained by Wallis, C.J., in *Raja of Pittapur* v. *Ballapragada Pallamraju*[9], was based on the long settled practice of the Court and as the learned Judge remarked must be regarded as a case coming within the proviso to the Act, save in cases in which interest is payable by law when the Act was passed. In *Hamira Bibi Ammal* v. *Zubaida Bibi*[24], which was a case of unpaid dower, the Judicial Committee allowed interest as "reasonable compensation" to a Muhammadan widow on account of the special features of the case and their Lordships observed that her right to claim "interest" was consistent with the rules recognised under the English as well as under the Muhammadan Law. It seems to me that this does not support the broad proposition that interest may be charged on "debts" in all cases on "general equitable considerations". In *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*[25] interest was awarded on the well-settled principle "that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of account and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon and this apart from fraud or misconduct in the nature of fraud". As I understand these Privy Council cases they do not support the general proposition for which they are cited in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*.[14]

In support of this portion of the argument Mr. Sastri cited a new case, namely, the decision in *Canadian Pacific Railway* v. *Toronto Corporation*.[29] In that case interest on the arrears of rent was allowed by the Privy Council; but from the facts it

9. (1920) 40 M.L.J. 18.
14. (1919) I.L.R. 42 M. 661: 36 M.L.J. 456.
23. (1878) L.R. 5 I.A. 31: I.L.R. 3 C. 654 (P.C.).
24. (1916) L.R. 43 I.A. 294: I.L.R. 38 A. 581: 31 M.L.J. 799 (P.C.).
25. (1915) L.R. 42 I.A. 91: I.L.R. 42 C. 914: 29 M.L.J. 70 (P.C.).
29. (1905) A.C. 33.

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will appear that the suit was one for "specific performance" and for the enforcement of a covenant in a lease. Having regard to its nature the suit fell within the special jurisdiction of the Equity Courts and apparently it was on that account that interest was allowed. In this connection I may also refer to the decision in *Johnson* v. *Rex*[30] cited by Mr. Sitarama Rao. In that case their Lordships of the Privy Council held that interest on two sums, which one Johnson, a Government contractor in Sierra Leone, admittedly received from the Army Paymaster in excess of what was due to him and which he retained in his own hands for over a year, was not payable by him to the Crown. In so holding they gave effect to the law as settled by the judgment of the House of Lords in the case of *London, Chatham and Dover Railway Co.* v. *The South Eastern Railway Co.*[3] In the course of the judgment, their Lordships indicated the view that if the Crown had rested its case on fraud then interest would have been awarded, as interest is recoverable both at law and in equity on money obtained by fraud and retained by fraud. If fraud had been alleged and proved, the case would have come specially within the jurisdiction of the Equity Courts and would have fallen within the first class of cases mentioned in Halsbury, Vol. XXI, page 40. On this part of the case, my view is that the Interest Act is exhaustive and that only such equitable grounds as were generally recognised in Courts of Equity could be relied on in awarding interest on equitable grounds and that the case in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*[14], having regard to the principles which I have discussed here, has not been correctly decided. The remarks of Lord Blackburn as regards Lord Tenterden's Act in *Duncombe* v. *Brighton Club and Norfolk Hotel Company*[1] that

> "The statute ought to have said that wherever there is a debt at all it should bear interest, unless there is some strong reason to the contrary. But as the statute stands, this is not the case,"

may well be applied to the Indian enactment also. But however much we may deplore the present state of the law it seems to me that the decisions do not permit us to stretch the doctrine of "equitable grounds" to meet all the cases where we think interest should be awarded. In these circumstances, unless the

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1. (1875) L.R. 10 Q.B. 371.
3. (1893) A.C. 429.
14. (1919) I.L.R. 42 M. 661: 36 M.L.J. 456.
30. (1904) A.C. 817.

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plaintiff's claim to "interest" comes within the Interest Act or any other rule of law, it cannot be supported.

The next question for consideration is whether the plaintiff is entitled to claim interest under the Interest Act XXXII of 1839. That Act provides that

"Upon all debts, or sums certain payable at a certain time, the Court before which they may be recovered, may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums were payable, if such debts or sums be payable by virtue of some written instrument at a certain time. . . . ."

To attract the provisions of this Act to a written contract, two conditions are necessary, (1) a certain sum must be payable, and (2) this sum must be payable at a certain time, under the contract. It was pointed out in *Juggomohun Ghose* v. *Manickchund*[5] that

"The certainty required must exist at the time when the promise is made; and, therefore, that the Act does not . . . . affect debts contingent in amount, and time becoming due."

On this reasoning, their Lordships held that a "sum certain" is not payable by a written instrument at a "time certain" if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when these events happen and that the time for the happening of those events, if they ever do happen, may be indefinitely postponed.

This decision was followed by their Lordships in a very recent decision, *Maine and New Brunswick Electrical Power Co.* v. *Hart*[4] in deciding a case under section 24 (1) of the New Brunswick Judicature Act of 1909, which in this respect is similar in terms to the Interest Act. The Indian enactment was framed in order to extend to India the provisions of Statute 3 and 4 William IV, c. 42, section 28 and substantially adopts the language of it. That these terms are understood in the same way under the English enactment will appear from the decision in *London, Chatham and Dover Railway Co.* v. *The South Eastern Railway Co.*[3], which discusses the earlier English decisions on the same point, namely, *Merchant Shipping Co.* v. *Armitage*[2] and *Duncombe* v. *Brighton Club and Norfolk Hotel Company.*[1] In that case, Lord Herschell expressed the view that, where the time of payment is stated to be "as soon after the 1st of June as possible, and not later than the 15th of June"

1. (1875) L.R. 10 Q.B. 371. 2. (1873) L.R. 9 Q.B. 99 at 114.
3. (1893) A.C. 429 at 435. 4. (1929) A.C. 631.
5. (1859) 7 M.I.A. 263.

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"it is a little difficult to say that that is a 'time certain' even as regards the 15th of June". The decision in In re *Horner, Fooks* v. *Horner*[6] does not lay down any different principle; for the death of the testator within six months after which the sum was made payable in that case "is not a contingent event, for death is a certainty which must happen to all; and so many days after death is a time certain for the purposes of the statute." Having regard to these principles, can it be said that the amount sought to be recovered as rent in the present case is "a certain sum;" recoverable at "a certain time" within the meaning of the Interest Act? I think not. I have already referred to the main terms of the document at the commencement of this judgment. According to these terms, as pointed out by Phillips, J., in his judgment, the rent which the lessee has to pay varies with circumstances which are necessary to be proved, such as, the extent of the land cultivated in any particular year and also the amount of assessment levied by the Government in that year. It is also noticeable that no definite period is fixed for the payment of rent. In these circumstances it cannot be said in this case that "a sum certain" is payable at "a certain time" within the meaning of the Interest Act. I must, therefore, hold that the plaintiff is not entitled to invoke the provisions of the Act in support of his claim to interest.

The last question is whether the plaintiff is entitled to interest under section 73, Illustration (*n*) of the Contract Act. This question of law arose for decision in *Kamalammal* v. *Peeru Meera Lavvai Rowthen*[12]. In that case, the plaintiff sued to recover some money due to her on an oral contract together with interest. No agreement or usage having a right to interest was alleged and no written demand or notice had been given under the Interest Act. It was held that the plaintiff was not entitled to interest. It was argued in that case that the plaintiff could claim interest under section 73 of the Contract Act coupled with illustration (*n*). The learned Judges held that to construe the section as giving a right to interest in those cases in which it cannot be awarded according to the provisions of Act XXXII of 1839 would be to hold that the latter enactment was virtually repealed by the former. Their Lordships were not prepared to hold that it was so repealed. They also pointed out that there was no real conflict between section 73 of the Contract Act and Act XXXII of 1839, since effect

6. (1896) 2 Ch. 188.
12. (1897) I.L.R. 20 M. 481: 7 M.L.J. 263.

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may well be given to section 73 by holding that the award of interest as compensation contemplated by that section has reference to cases in which such award can be made without infringing the provisions of the other Act. In other words, illustration (*n*) to section 73 merely states that, if a contract to pay a sum of money on a specified day is broken, nothing except interest up to the date of payment can be claimed as damages, provided such interest can be claimed under the Interest Act or any other rule of law. After referring to the "Common Law Rule" regarding interest on debts, Pollock and Mulla make the following observations regarding the scope of illustration (*n*) to section 73:—

> "There does not seem to be any sufficient ground for reading into illustration (*n*) to the present section an intention to abolish this rule and supersede the Act of 1839. Indeed, the illustration does not say that the defendant is necessarily liable to pay interest, but only assumes that he may be so under the Act of 1839 or otherwise, and says that he is not in any event liable for more."

(*See* page 414, Pollock and Mulla, the Indian Contract Act, 5th Edition.)

The decision in *Kamalammal* v. *Peeru Meera Levvai Rowthen*[12] has been dissented from in Calcutta [see *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya*[7]; per Banerjee, J., and *Khetra Mohan Poddar* v. *Nishi Kumar Saha*.[31]] The view of the Calcutta High Court, says Sir Frederick Pollock, goes indeed beyond the English Common Law. The view of the Bombay High Court in *Saundanappa* v. *Shivbasawa*[32] is also opposed to the decision in *Kamalammal* v. *Peeru Meera Levvai Rowthen*[12]. In that case it was held that

> "neither the Interest Act nor the Contract Act affects the rule of Hindu Law; that in the case of a debt wrongfully withheld after demand of payment has been made, interest becomes payable from the date of demand by way of damages. That law was in force when the Interest Act was passed, and under the proviso to the section of the Act it has continued to be in force. The Indian Contract Act has not interfered with that law. On the other hand, that law is consistent with the provisions of that Act."

This view of the Bombay High Court which is somewhat novel was not pressed before us by the respondents' learned Advocate. In *Ghanshyam Singh* v. *Daulat Singh*,[33] which was a suit by the landlord for arrears of rent together with interest, it was held that though the lessee was not entitled

7. (1899) I.L.R. 26 C. 955.
12. (1897) I.L.R. 20 M. 481: 7 M.L.J. 263.
31. (1917) 22 C.W.N. 488.
32. (1907) I.L.R. 31 B. 354.
33. (1896) I.L.R. 18 All. 240.

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to "interest" under the N.W.P. Act, he was entitled to claim it under section 73 of the Contract Act; but the learned Judges do not discuss the scope of illustration (*n*) on which the judgment is based; nor do they refer to the Interest Act. The observations of the learned Judges in *Zwala Prasad* v. *Hoti Lal*[34] do not throw any clear light on this question. Two decisions of the Privy Council, namely, *Muhammad Mehdi Ali Khan* v. *Muhammad Yasin Khan*[35] and *Ganesh Bakhsh* v. *Harihar Bakhsh*[36] were referred to in this connection to show that in one of the cases, namely, *Muhammad Mehdi Ali Khan* v. *Muhammad Yasin Khan*[35] their Lordships indicated, though very faintly, that their inclination is in favour of the view that interest cannot be awarded under section 73 of the Contract Act and that in the other, namely, *Ganesh Bakhsh* v. *Harihar Bakhsh*[36] their Lordships indicated, though inferentially, that their view is in favour of the contention that interest can be so awarded. But the judgments do not bear those interpretations; on the other hand they show that the question was not considered by their Lordships. In this state of authorities I must hold following the decision in *Kamalammal* v. *Peeru Meera Levvai Rowthan*[12], which has not been departed from in this Court in any of its subsequent decisions, that the plaintiff is not entitled to claim interest under section 73 of the Contract Act read with illustration (*n*).

For the above reasons, the decision of Phillips, J., under appeal in Letters Patent Appeals Nos. 256 to 258 should be reversed and the plaintiff's suit so far as it relates to interest should be dismissed with costs.

L. P. Appeal No. 255 *of* 1925.—The lease deed in this appeal contains the following additional term:—

"If I allow the said Janmavakasa pattom (rent) to fall into arrears without paying the same at proper time, there is no hindrance by this Saswatha pattom for your duly recovering the said Janmavakasa pattom out of these properties or out of my other properties."

By this term, the leased properties and the other properties of the lessee are charged with the payment of rent due under the lease. Having regard to this fact, following the decision in *Drax*, In re; *Savile* v. *Drax*[13], I must hold that the landlord is entitled to claim interest on the arrears of the rent in this

12. (1897) I.L.R. 20 M. 481: 7 M.L.J. 263.
13. (1903) 1 Ch. 781.
34. (1924) I.L.R. 46 A. 625.
35. (1898) I.L.R. 26 C. 523.
36. (1904) I.L.R. 26 A. 299.

case. In *Drax*, In re; *Savile* v. *Drax*[13] the principle to be applied is thus stated by Collins, M.R., at page 793:

"It seems to me to be well established on the authorities, and the result of those authorities does not indeed appear to be disputed, that a Court of Equity has power to give interest, and in point of fact does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge. Indeed, we may go back to the principle laid down in many cases showing that, in point of fact, the Court of Equity does charge interest."

Romer, L.J., and Cozens-Hardy, L.J., also express the same view. This principle is not disputed by Mr. Sitarama Rao. This Letters Patent Appeal is dismissed with costs.

B.V.V. *L.P.A. Nos.* 256 *to* 258 *of* 1925 *allowed.*
L.P.A. No. 255 *of* 1925 *dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND SIR LANCELOT SANDERSON.

Nilkanth Balwant Natu and others .. *Appellants**

v.

Shri Satchidanand Vidya Narasinh Bharati Swami Guru, Shri Satchidanand Vidyashankar Bharati, Swami Math Sankeshwar and others .. *Respondents.*

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Civil Procedure Code (V of 1908), *S.* 17—*Mortgage of properties in British India, some being outside jurisdiction, and of property not in British India—Foreclosure or sale on foot of—Suit for—Jurisdiction of British Indian Court to entertain—Mortgage security—Abandonment of portion of—Evidence—Bombay Regulation V of* 1827, *S.* 15 (3)—*Scope and applicability of—Suit to enforce mortgage—Limitation—Starting point—Mortgagee entitled, but not bound, to go into possession and collect rents and profits—No time fixed for payment—Demand and refusal—Limitation only from—Limitation Act, Art.* 132.

In a suit for foreclosure or sale on foot of certain mortgages instituted in the Sub-Court of Satara in the Bombay Presidency, it appeared that the properties, in respect of which relief was sought, were situated in Satara, Belgaum and Kolhapur, Satara and Belgaum being, and Kolhapur not being, within British India.

Held, that the Sub-Court of Satara had no jurisdiction to try the suit, so far as it related to the mortgaged properties situate in Kolhapur; that it had jurisdiction to try the suit so far as it related to the mortgaged properties situate in Satara; and that, inasmuch as the mortgaged properties in Belgaum were within the jurisdiction of a different Court in British India, it had jurisdiction to deal with those properties also.

*P.C. Appeal No. 71 of 1927. 1st April, 1930.

13. (1903) 1 Ch. 781.

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The words "a suit to obtain relief respecting immoveable property" in S. 17, Civil Procedure Code, are wide enough to cover suits for foreclosure or sale on foot of mortgages. The words "within the jurisdiction of different Courts" in that section must, however, be held to mean within the jurisdiction of different Courts to which the Code of Civil Procedure applies, that is to say, Courts in British India, because the provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India.

Where in a case in which the mortgage deeds were not cancelled but remained with the mortgagee, and there was no evidence of any surrender of the mortgagee's rights, the High Court thought that the fact that the mortgagee gave up possession of a portion of the mortgaged property to the mortgagor, his spiritual guru, and took no steps to recover possession thereof until the suit was filed long after raised the presumption that the mortgagee had agreed that the security of that portion of the mortgaged property should be given up, *held* that the fact relied upon was insufficient to raise that presumption.

Sub-S. 3 of S. 15 of Bombay Regulation V of 1827 is not limited to the case where the creditor has been placed in possession and remains in possession. Its terms are general and wide enough to cover a mortgage which is not strictly a usufructuary mortgage, but under which the mortgagee has the right to collect the rents and profits of the mortgaged property, and under which he does enter into possession of the mortgaged property and collect the rents and profits arising therefrom but subsequently gives up possession to the mortgagor.

In a suit for sale on foot of certain mortgages, which provided for interest at a certain rate, and that the mortgagee should have the right to collect the rents and profits arising from the mortgaged property, an account being taken for each year and the balance due for principal and interest settled, but which fixed no time for payment of the debt, *held,* that the mere fact that the mortgagee permitted the mortgagor to receive the rents and profits subsequent to the dates of the mortgages did not give rise to a cause of action for the suit, and that on the facts of the case the mortgage money did not become due and the cause of action did not arise until demand for payment of the mortgage debt was made by the mortgagee and it was refused by the mortgagor.

The mortgagee was not bound by the terms of the mortgages to enter into possession of the mortgaged properties and to apply the rents and profits thereof towards the payment of the debt, though he had power to do so.

Consolidated Appeal No. 71 of 1927 from two decrees, dated the 12th February, 1924, of the High Court, Bombay, varying a decree, dated the 21st July, 1919, of the Court of the First Class Subordinate Judge of Satara.

Nilkanth Balwant Natu and other appellants in the first appeal and respondents in the second brought the suit in which those decrees were made against the respondent and his rival claimant to the office of Jagad Guru of the Sansthan (Foundation) of the great Sankeshwar and Karvir Math.

They brought that suit as successors-in-title to one Balaji Narayan Natu on five mortgages which they asserted that the

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Jagad Guru of that Math had in the years 1840-43 granted to him.

The Courts in India held that, of the properties which the mortgages purported to charge, only one situate in the foreign State of Kolhapur was subject to them; the mortgagees admitted that they had been out of possession of the only other properties (situate in British India) against which they sought relief since some date before the year 1860 and on this admission the Trial Judge held that the suit as to these properties was barred by limitation and the High Court without deciding the question of limitation held that the mortgagees had released those properties.

The chief questions in the present appeals to His Majesty in Council were as to whether the claim of the mortgagees against the properties in suit in British India had not become barred or been released; as to the jurisdiction of the Satara Court over the properties in suit in Kolhapur; and as to all the properties in suit the extent of the original mortgagor's interest in, and authority to mortgage, them, the necessity for the mortgage, and its true construction.

Dunne, K.C. and *M. R. Jardine* for plaintiffs-appellants.

De Gruyther, K.C., Raikes, Parikh and *B. B. Joshi* for respondents-defendants.

Dunne, K.C. for appellants.—The High Court was wrong in inferring from the mortgagee's discontinuance of the Satara and Belgaum properties that it was agreed that only the Kolhapur properties should be treated as security for the mortgage debt. There is no evidence to support the finding of the High Court that we elected to accept the Kolhapur property as sole security and for the whole debt.

As regards jurisdiction, the question was never raised in the High Court that the Trial Court had no jurisdiction over the Kolhapur property.

On the question of limitation, we submit that we do not want possession, but only the usual mortgage decree for sale, and Art. 142 of the Limitation Act does not deprive us of that right.

[SIR LANCELOT SANDERSON.—Your contention is, that so far as relief by way of possession is concerned, you are time-barred, but that you are not barred of your remedy by way of sale.]

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We have 60 years within which to bring the suit for sale. Refers to sub-clause (2) of section 20, Limitation Act, as to effect of receipt of rents and profits, and to the observations of Baron Parke in *Juggeewundas Keeka Shah* v. *Ramdas.*[1]

De Gruyther, K.C. for respondents (defendants).—The Satara Court had no jurisdiction to entertain the suit as regards properties outside British India: *Setrucherla Ramabhadraraju v. Maharaja of Jeypore,*[2] *Vahoji* v. *Camaji,*[3] *Penn* v. *Lord Baltimore*[4] and *British South Africa Co.* v. *Companhia de Mocambique.*[5]

The High Court were right, on the evidence, in coming to the conclusion that the mortgagees had released the properties in British India.

As these were usufructuary mortgages, an order for sale is not competent; Bom. Reg. V of 1827, section 15; *Shaikh Idrus* v. *Abdul Rahiman*[6] and *Sadashiv Abaji Bhat* v. *Ramrao Shinde*[7]; definition of "usufructuary mortgage" in section 58, Transfer of Property Act, 1882, referred to.

[LORD BLANESBURGH.—The mortgagee here is liable to account for the rents and profits, and he gets 9 per cent. interest. Would that make it a usufructuary mortgage?]

The definition in the Transfer of Property Act, section 58, is very comprehensive.

In this case, the mortgagees, being deprived of possession, could only get back their property by a suit for possession, and they could not sue for sale.

[LORD RUSSELL.—Your contention is that if the mortgagee is barred by time from suing to recover possession, he is not entitled to an order for sale under clause (3) of section 15 of the Bombay Regulation V of 1827?]

Yes. The decision in *Juggeewundas* v. *Ramdas*[1], relied on by my friend, is not in point. The only right which the mortgagee had in this case was to possession, and his right was barred after 12 years from the time he gave up possession in 1859; Limitation Act (XIV of 1859), section 12.

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1. (1841) 2 Moo. I.A. 487 at 500.
2. (1919) L.R. 46 I.A. 151: I.L.R. 42 M. 813: 37 M.L.J. 11 (P.C.).
3. (1904) I.L.R. 29 B. 249.
4. (1750) 1 Ves. (S.) 444.
5. (1893) A.C. 602.
6. (1891) I.L.R. 16 B. 303.
7. (1895) I.L.R. 20 B. 296.

Article 147 of the Limitation Act, 1908, giving a period of 60 years applies only to English mortgages, where the mortgagee is entitled to sue for foreclosure or sale: *Vasudeva Mudaliar* v. *Srinivasa Pillai.*[8] The mortgagee here had only 12 years within which to sue for sale: Article 132.

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Dunne, K.C. replied.—The suit is not time-barred. The mortgage-money did not become "due" within the meaning of Art. 132, Limitation Act, until after demand. There is no evidence of any demand having been made more than 12 years prior to the institution of the suit.

1st April, 1930. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—The first appeal is by the plaintiffs in the suit, and the cross-appeal is by the second defendant, Vidya Narasinh Bharati Guru.

The plaintiffs brought the suit in the Court of the Subordinate Judge at Satara, as successors-in-title to one Balaji Narayan Natu, who was the mortgagee under certain mortgage deeds specified in the plaint, and executed between the years 1840 and 1844. The mortgages were made by Vidya Shankar Bharati, who is deceased. *The first and second defendants were rival claimants to the office of Jagad Guru of the Sankeshwar and Karvir Math, and each of them claimed to be the sole successor of the mortgagor. The first respondent is the legal representative of the first defendant.

The cross-appeal presented by the second defendant is with reference to mortgaged properties situate in Kolhapur district and is based upon the allegation that the Satara Court had no jurisdiction to entertain the suit with regard to the said properties in Kolhapur, which lie outside British India.

The appeal is against a decree, dated the 12th February, 1924, of the High Court of Bombay, in Appeal No. 146 of 1919, which varied a decree of the learned Subordinate Judge of Satara, dated the 21st July, 1919.

The cross-appeal is against the said decree of the High Court and another decree of the said High Court of the same date, in Appeal No. 169 of 1920, whereby the appeal of the second defendant was dismissed with costs.

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8. (1907) L.R. 34 I.A. 186: I.L.R. 30 M. 426: 17 M.L.J. 444 (P.C.).
*There was litigation between them which came up to the Privy Council, *see* I.L.R. 51 Bom. 442.—K.J.R.

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The properties, in respect of which relief is now sought by the plaintiffs, are situated in Satara, Belgaum and Kolhapur.

Satara and Belgaum are, and Kolhapur is not, within British India.

It will be convenient to deal first with the question relating to the properties in the Kolhapur district and the cross-appeal.

The learned Subordinate Judge among other issues settled the following:—

"(1). Did the mortgagor consolidate by his conduct or agreement all the mortgages together and is he estoppepd from contending that the several bonds are not a charge on the entirety of the property but only on property covered respectively by each?

"(2) Whether one suit can lie in this Court on different causes of action arising in different jurisdictions in respect of different bonds relating to different properties."

The learned Subordinate Judge tried as preliminary the first two issues and, deciding each of them against the plaintiffs, dismissed the suit on the 4th December, 1912, but the High Court on the 7th June, 1916, reversed his decree. holding on the first issue that there were stipulations in the mortgages which amounted to an agreement that the principle of consolidation should apply to them and on the second issue, that the Satara Court had jurisdiction to entertain the suit, under section 17 of the Code as relating to properties situate within the jurisdiction of any Courts.

The preliminary decree was set aside and the case was remanded to the Court of the Subordinate Judge for disposal.

The learned Subordinate Judge tried the remaining issues; he made an order for the appointment of a Commissioner, and on the return of the report he made a decree in favour of the plaintiffs for Rs. 3,31,882-0-8, and for recovery of possession of the mortgaged properties situate in Kolhapur.

On appeal the High Court amended the decree of the learned Subordinate Judge by giving liberty to the plaintiffs to bring to sale the mortgaged properties in the Kolhapur State and by giving certain directions as to interest.

The section of the Civil Procedure Code, 1908, on which the High Court relied, as giving jurisdiction to the learned Subordinate Judge of Satara with respect to the mortgaged properties in Kolhapur is section 17.

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The plaintiffs in the suit, among other matters, prayed for foreclosure or sale of the mortgaged property; it is therefore necessary to refer to the provisions of section 16 (*c*) of the Code, which are as follows:—

"Subject to the pecuniary or other limitations prescribed by any law, suits for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situate."

There is a proviso which does not affect the present case; and the "Explanation" is as follows:—

"In this section 'property' means property situate in British India."

The terms of section 17 are as follows:—

"17. Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate:

"Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court."

The High Court decided that the words "respecting immoveable property" are wide enough to cover suits for foreclosure, sale or redemption in the case of mortgages or charges upon immoveable property mentioned in section 16 (*c*), and that section 17 is supplementary to section 16 and in order to prevent multiplicity of suits.

Their Lordships agree with the learned Judges' decision that the words "a suit to obtain relief respecting immoveable property" are wide enough to cover the suit in the present case, which included prayers for foreclosure or sale of the mortgaged property; but that does not conclude the matter.

The question remains whether the words "situate within the jurisdiction of different Courts" does not limit the operation of the section to suits to obtain relief respecting immoveable property situate within the jurisdiction of different Courts within British India.

The preamble to the Civil Procedure Code recites that it is expedient to consolidate and amend the laws relating to the procedure of Civil Judicature, and section 1 (3) provides as follows:—

"This section and sections 155 to 158 extend to the whole of British India; the rest of the Code extends to the whole of British India, except the scheduled districts."

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The provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India, and their Lordships are of opinion that the words in Section 17 "within the jurisdiction of different Courts" must mean within the jurisdiction of different Courts to which the Code applies, that is to say, Courts in British India. This is in accordance with the decision of the Judicial Committee in *Setrucherla Ramabhadraraju* v. *Maharaja of Jeypore.*[1] Inasmuch as the properties in Kolhapur are not within the jurisdiction of any Court in British India, the learned Subordinate Judge of Satara had no jurisdiction to try the suit, so far as it related to the mortgaged properties situate in Kolhapur.

The learned Judge had jurisdiction to try the suit so far as it related to the mortgaged properties situate in Satara; and, inasmuch as the mortgaged properties in Belgaum are within the jurisdiction of a different Court in British India, he had jurisdiction to deal with those properties also.

The result therefore is that the cross-appeal of the second defendant must succeed, and the decrees of the Courts in India, so far as they relate to the properties situate in Kolhapur, must be set aside. The question of costs will be dealt with at a later stage.

The plaintiffs' appeal relates to the mortgaged properties situate in Satara and Belgaum. Both Courts in India rejected their claim in respect of these properties.

It was alleged on behalf of the defendants that the properties comprised in the mortgages were Dewasthan or Saranjam and not liable to be mortgaged. Both the Courts in India have decided against the defendants in respect of this contention, and their Lordships see no reason for doubting the correctness of that decision.

The learned Subordinate Judge held that the plaintiffs were not entitled to an order for sale of the properties in Satara and Belgaum, and further that the plaintiffs' claim for possession of these properties was not brought in time.

The learned Judges of the High Court held that there was nothing in the mortgages to exclude the right of sale given by Section 15 of the Bombay Regulation V of 1827, but they came to the conclusion that the properties in British territory were

1. (1919) L.R. 46 I.A. 151 at 157: I.L.R. 42 M. 813: 37 M.L.J. 11 (P.C.).

given back to the mortgagors before 1860 and that no steps were taken to recover possession until the present suit was filed. They thought that the proper presumption was that the parties agreed that the security of the above mentioned properties should be given up, and that the Kolhapur properties only should be considered as security for the debt.

As already stated, the High Court made a decree that the plaintiffs were entitled to bring the properties in Kolhapur to sale, but the decree gave the plaintiffs no relief in respect of the mortgaged properties situate in Satara and Belgaum.

It is against that part of the decree that the plaintiffs' appeal is directed.

The Exhibit 38, which is a translation of the mortgage-deed of the 15th July, 1840, may be taken as a specimen of the mortgages. It was made between Vidya Shankar Bharati, the mortgagor, and Balaji Narayan Natu, the mortgagee. It recited that Rs. 20,000 had been borrowed for the expenses of the Sansthan; that it had been agreed to pay interest thereon at the rate of twelve annas per cent. per mensem without remission; that for the repayment of the debt the four Inam villages of the Sansthan therein specified were mortgaged.

The total revenue of the four villages, 4,300, made up of 2,700 in Shambhu Pirkhani (coin) and 1,600 in Panhali (coin), was assigned in mortgage. The deed contained certain clauses as to management, of which the following are relevant:—

"An account of the debt due to you, *i.e.*, of the principal borrowed and interest will be made on the 1st of Ashad Vad (latter half) and after deducting the vasul (collection) of the villages that may have been applied towards the debt, we shall approve and pass the account of balance that may be found due and affix our seal thereto. Even if we fail to pass the account yet we shall get the said villages released after clearing off the total amount of balances found due every year. . . .

"Within one month after the closing of the year, the accounts in respect of the villages should be got prepared by the Patil Kulkarni and submitted to the Huzur. The same will be examined and passed within one month. If any additional vasul (revenue) be received by you, the same shall be entered towards the repayment of the debt at the time of the passing of the accounts by confrontation with your Karkun (clerk). You will have nothing to do with any difference after two months subsequent to the passing of the accounts. . . .

"If we can manage to get moneys from other sources for the repayment of your debt, you should accept the amount when we pay it and release the villages. If in the year in which we pay the money, it is paid within a month after the expiry of that year, the amount of remuneration stated above will be given proportionately; and if the amount is paid after one month, the amount of remuneration for the whole year will be given."

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The other mortgages are to the same effect, and this appeal was argued by both sides on the assumption that the mortgages were consolidated, as held by the High Court, and that the debts due under all the mortgage deeds were a charge upon all the properties.

There is no doubt that the mortgagee, or his successors in title, went into possession of the mortgaged properties and received the rents and profits arising therefrom. It has, however, been established that after 1859 the mortgagee did not collect the rents and profits of the mortgaged properties which are in Satara and Belgaum.

It was alleged by the defendants that there was an actual adjustment between the parties in 1849 or 1850 to the effect that a sum of Rs. 1,32,000 should be paid without interest in full settlement of the mortgage debts, that the mortgage deeds were cancelled and that in pursuance of the said adjustment the mortgagee gave up his possession of the mortgaged properties in British India.

The Courts in India held that the above mentioned allegation was not proved, and no reliance was placed upon it at the hearing of this appeal.

Their Lordships are unable to agree with the decision of the High Court, that the parties agreed that the security of the mortgaged properties in British India should be given up and that the mortgaged properties in Kolhapur only should be considered as security for the debt.

The learned Judges came to that conclusion, holding that a presumption to the above mentioned effect was raised by the facts. The two facts relied upon were that before 1860 the properties in British territory "were given back" to the mortgagors and no steps were taken to recover possession until the suit was filed.

In the first place, in their Lordships' opinion there is no evidence to justify the finding that the said properties "were given back" if by these words the learned Judges meant a retransfer of the properties. The mortgage deeds were not cancelled. They remained with the mortgagee or his successors, and they were produced and proved by the plaintiffs at the trial. There is no evidence of any surrender of the plaintiffs' rights, except the fact that after 1859 the plaintiffs or their predecessor ceased to receive the rents and profits of the mortgaged properties situated in Satara and Belgaum.

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In the second place, even if the facts relied upon by the learned Judges are sufficient to raise the presumption to which they referred, they are consistent with other presumptions, which may be said to be just as reasonable as that on which the learned Judges founded their judgment. As, for instance, the learned Subordinate Judge thought it was quite reasonable to adopt the suggestion that, the mortgagor being the spiritual guru of the mortgagee, the mortgagee might have given up the possession of the villages in British Territory to enable the mortgagor to maintain the establishment and meet the expenses of the Sansthan, without in any way intending to give up his rights as mortgagee or to abandon his remedies, if and when he desired to enforce them.

It is not necessary to deal with this part of the case at any length, as it was not seriously argued that the judgment of the High Court could be supported on the above mentioned ground.

The main ground on which the defendant-respondents relied at the hearing before the Board was that the mortgages were usufructuary mortgages, and that if the mortgagee was not in possession, his only right was to be placed in possession or to sue to recover the money from the mortgagor personally by reason of his breach of contract to place the mortgagee in possession, and that the plaintiffs were not entitled to an order for sale of the mortgaged properties.

The provisions regulating the rights of the parties under the mortgages in suit are contained in the Bombay Regulation V of 1827.

Chapter V of the said Regulation is headed "Of the disposal of property mortgaged or pledged." The chapter consists of one section, *viz.*, section 15, which is as follows:—

"*First.* When a creditor is placed in possession of property by mortgage or otherwise, as security for a debt, his claim over such property shall, in the absence of other special agreement, constitute his sole security for payment of the debt, or such part of it as the said property may have been given in security for, and interest thereon is to be considered as included in the said security.

"*Second.* If the property yield profit, and no stipulation has been made respecting the disposal of the said profit, or payment of interest on the debt, the profit shall be considered as equivalent for the interest.

"*Third.* In the absence of any special agreement or recognised law or usage to the contrary, either party may at any time, by the institution of a civil suit, cause the property to be applied to the liquidation of the debt, the surplus, if any, being restored to the owner."

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Their Lordships are of opinion that the learned Judges of the High Court were right in holding that section 15 (3) of the Regulation is applicable to the mortgages in suit. That sub-section, in their Lordships' opinion, is not limited to the case where the creditor has been placed in possession and remains in possession.

The chapter purports to deal with the disposal of property mortgaged, and in their Lordships' opinion the terms of section 15 (3) are general and wide enough to cover the mortgages now in suit, and the property thereby charged.

The plaintiffs, therefore, were entitled by the institution of a civil suit to cause the property to be applied to the liquidation of their debt, or in other words to bring a suit for the sale of the properties, unless it could be shown that there was a special agreement or recognised law or usage to the contrary.

There is no suggestion that there is any law or usage to the contrary, and their Lordships are of opinion that there is no evidence of any special agreement to the contrary either in the terms of the mortgages or otherwise.

Consequently, the rights of the plaintiffs under the mortgages being still in existence, and the monies being due, the plaintiffs, subject to the question of limitation, are entitled to an order for sale of the mortgaged properties situate in Satara and Belgaum.

The question remains whether the plaintiffs' suit is out of time.

It was argued on behalf of the defendants that the cause of action arose in 1859 or 1860, when the plaintiffs' predecessor ceased to be in possession of the mortgaged properties in Satara and Belgaum: that the Limitation Act, No. XIV of 1859, was then in force and that by reason of section 1 (16) the suit was out of time, inasmuch as it should have been brought within the period of six years from the time the cause of action arose.

Reliance also was placed upon Art. 132 of the Indian Limitation Act, 1871, by which it is provided that a suit to enforce payment of money charged upon immoveable property must be brought within twelve years from the time when the money sued for becomes due. This section is in similar terms to Art. 132 of the Limitation Act, 1908.

Their Lordships are not able to accept the defendants' contentions in this respect.

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In the first place the plaintiffs or their predecessor were not bound by the terms of the mortgages to enter into possession of the mortgaged properties and to apply the rents and profits thereof towards the payment of the debt, though they had power so to do, and the mere fact that the mortgagee permitted the mortgagor to receive the rents and profits in and from 1860 did not give rise to a cause of action.

In the second place there was no specific time fixed for the payment of the debt, and their Lordships are of opinion on the facts of this case that the money did not become due and the cause of action did not arise until demand for the payment of the mortgage debt was made by the mortgagee and it was refused by the mortgagor.

Their Lordships' attention has not been drawn to any evidence of any such demand and refusal prior to the institution of this suit, and the filing of the written statements by the defendants. Consequently they are of opinion that the suit was not barred by limitation.

The appeal of the plaintiffs, therefore, must be allowed so far as the mortgaged properties in Satara and Belgaum are concerned.

The decree of the High Court in Appeal No. 146 of 1919, and dated the 12th February, 1924, should be set aside and a decree made in the suit in favour of the plaintiffs against the defendants for the sum of Rs. 3,31,822-0-8 and interest thereon at the rate of 12 annas per cent. per mensem from the date of suit until realisation, and for the balance of costs, if any, hereinafter mentioned, with a direction that the said sums are to be paid within six months of the date on which the order of His Majesty in Council is received by the Court of the Subordinate Judge, and that in default the plaintiffs will be entitled to bring to sale the mortgaged properties situate in Satara and Belgaum.

As already stated the cross-appeal must succeed. Consequently the decree of the High Court, dated the 12th February, 1924, in Appeal No. 169 of 1920, must be set aside.

The position is that the plaintiffs have succeeded in their appeal so far as the mortgaged properties in Satara and Belgaum are concerned, but the cross-appeal, which concerns the mortgaged property in Kolhapur, has succeeded, and the plaintiffs consequently have failed to hold the decree in their favour in respect of the property in Kolhapur.

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In their Lordships' opinion the order as to costs should be that the cross-appeal be allowed with costs, that the plaintiffs' appeal be allowed to the extent already stated, and that the plaintiffs are entitled to one-half of their costs on their appeal to His Majesty in Council, and in both the Courts in India, that the costs of the cross-appeal be set off against the costs thus awarded to the plaintiffs and that the balance, if any, be added to or deducted from their above mentioned mortgage debt as the event may require.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co. and Stanley Johnson & Allen.*

K.J.R. *Appeal allowed: Decrees of High Court varied.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—VISCOUNT DUNEDIN, SIR JOHN WALLIS AND SIR GEORGE LOWNDES.

Rai Ram Protap Chamaria Bahadur and others .. *Appellants**

v.

The Secretary of State for India in Council .. *Respondent.*

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Rai Ram Protap Chamaria Bahadur v. The Secretary of State for India in Council.

Land Acquisition Act (I of 1894)—Appeal to Privy Council—Interference on question of mere valuation.

In appeals to the Privy Council raising the question of the proper value to be allowed for land compulsorily acquired by the Government under the Land Acquisition Act, 1894, their Lordships will not interfere with the amount awarded by the High Court unless it can be shown that there has been some real mistake in law or some palpable omission which would invalidate the valuation.

Narsingh Das v. *Secretary of State for India,* (1924) L.R. 52 I.A. 133: I.L.R. 6 L. 69: 48 M.L.J. 386 (P.C.) and *Nowroji Rustomji Wadia* v. *Bombay Government,* (1925) L.R. 52 I.A. 367: I.L.R. 49 B. 700: 49 M.L.J. 233 (P.C.), followed.

Three Consolidated Appeals (No. 71 of 1929) from one judgment and three decrees, dated the 9th February, 1927, of the High Court, Calcutta, which varied one judgment and three

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*P.C. Appeal No. 71 of 1929. 27th June, 1930.
Bengal Appeals Nos. 32, 33 and 34 of 1927.

decrees, dated the 5th December, 1924, of the Special Land Acquisition Judge, 24-Perganas.

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De Gruyther, K.C. and *Dube* for appellants.

Dunne, K.C. and *Wallach* for respondent were not called upon.

27th June, 1930. Their Lordships' judgment was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—This is a case which follows many other cases raising the question of the proper value to be allowed for certain compulsorily-acquired land. The general principles on which the Board deals with these cases have been laid down particularly in two cases cited *Narsingh Das* v. *Secretary of State for India in Council*[1] and *Nowroji Rustomji Wadia* v. *Bombay Government*[2]. It is clear from those cases that their Lordships cannot interfere with the figures that have been settled by the High Court unless it can be shown there has been some real mistake in law or some palpable omission which would invalidate the valuation. Now here, the whole case for the higher valuation which is asked for depends upon the appellants being able to appeal to a certain contract for sale of part of the lands which fixed a very much higher figure. The learned Judges, acquainted with the circumstances on the spot, have come to the conclusion that that contract, though it did exist on paper, did not in any way represent the value in the market, but was a sort of speculative endeavour of a certain party to get at a foundation for acquiring some of the land with a view of obtaining the rest eventually, so that he might avoid competition. But the transaction was never proceeded with and remained only a piece of paper, and the Judges have held that this was not a circumstance which should affect their minds in arriving at the true market value. On the view arrived at of the whole circumstances of the case, it would be impossible for this Board to take any other view in accordance with the principles laid down in prior decisions. Therefore, their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Watkins & Hunter.*

Solicitors for respondent: *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

1. (1924) L.R. 52 I.A. 133: I.L.R. 6 L. 69: 48 M.L.J. 386 (P.C.).
2. (1925) L.R. 52 I.A. 367: I.L.R. 49 B. 700: 49 M.L.J. 233 (P.C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN AND SIR GEORGE LOWNDES.

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Suresh Chandra Mukherjee v. Srijukta Jyotirmoyee Debi.

Suresh Chandra Mukherjee and another .. *Appellants**

v.

Srijukta Jyotirmoyee Debi and others .. *Respondents.*

Will—Construction of—Reference to death of legatee—Death at any time or in the lifetime of the testatrix.

Although a reference, in a Will, to death will, *prima facie,* refer to death at any time.

Held, on the construction of the particular wording of the Will in suit, that the reference to death there must be taken to be a reference to death in the lifetime of the testatrix.

Appeal No. 69 of 1929 from a decree of the High Court, Calcutta, dated the 23rd February, 1927, affirming a decree of the Subordinate Judge of Dacca, dated the 13th August, 1924.

The sole question for determination on the present appeal was, whether, on the true construction of the terms of the Will, dated the 3rd October, 1913, of one Kripamoyee Debi, there was an intestacy with regard to the residue of the estates devised therein, as contended on behalf of the plaintiffs-appellants. Both the Courts in India decided against the plaintiffs' contention, answering the question in the negative.

The material passages from the Will are set out in their Lordships' judgment.

Dunne, K.C. and *Raikes,* K.C. for appellants.

Dube for respondents.

The following authorities were cited at the Bar in the course of the argument:—

Ex parte *Rogers*[1], *Lee* v. *Busk*[2] and Jarman on Wills, 6th Edition, p. 676.

1st July, 1930. Their Lordships' judgment was delivered by

Lord Russell.

LORD RUSSELL OF KILLOWEN.—The principal question for determination on this appeal is whether on the true construction of a will and in the events which have happened the testatrix died intestate in regard to the one-third share of the proper-

*P.C. Appeal No. 69 of 1929. 1st July, 1930.
Bengal Appeal No. 39 of 1927.

1. (1816) 2 Madd. 449.
2. (1852) 2 De G. M. & G. 810.

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ties described in clause 6 of her will, which was given to her niece, Indumayi Debi for life.

The Subordinate Judge at Dacca held that there was no intestacy, and his decision was affirmed (though on different grounds) by the High Court of Judicature at Fort William in Bengal.

There is no dispute as to the relevant facts. The testatrix, Kripamoyi Debi, had no child of her own, but she had three nieces, the daughters of her deceased youngest brother, to whom she had acted as a mother. She had also stepsons and a stepdaughter, the children of her husband by another wife. In those circumstances she made her will on the 3rd October, 1913.

Clause 2, so far as relevant, is in the following terms:—

"My said deceased youngest brother has left three daughters. The eldest is Indumayi Debi and her husband is alive; she has three sons and a daughter named Suramasundari Debi. The second daughter is named Jyotirmayi Debi; she has lost her husband; she has a son named Jalad Chandra Mukhopadhyaya, and two daughters named Promodebala and Bibhubala Debi. The third daughter is named Taritmayi Debi; her husband is alive, and a son and a daughter have been born to her. I have brought up my said three nieces from their infancy, and I bear great affection for them and they too respect and regard me as their mother. It is one of my principal objects to make special provisions regarding them by this Will, and it is also my desire to entrust the post of the Shebait to them in succession."

By clause 3 she made some provision for her stepsons and the sons of deceased stepsons. By clause 4 she made a disposition of cash, Government notes and book debts, under which benefits were conferred upon her husband, her stepsons, her stepdaughter and the daughters of her three nieces. The residue of the specific property covered by this clause remaining after paying the legacies to the legatees appears to be given to the three nieces absolutely with gifts over if "at that time" any of the nieces be dead.

Clauses 5 and 6 run thus:

"5. On my death the executrix shall so long as the estate left by me will be under the management of the executrix, pay to my husband at the rate of Rs. 6,000 per year in four equal instalments. Afterwards from the time when she will, according to the provisions of this Will, make over two-thirds of all the immoveable properties left by me save and except the properties of Schedules (Ka), (Kha), (Ga) and (Gha), to her two sisters, or to any of her sisters and in case any of her sisters being dead, to her sons, the said enjoyers of the properties shall be bound to pay to my husband the said sum of money in equal shares, that is to say, the enjoyers of each one-third share shall pay a one-third share of the said Rs. 6,000, *i.e.*, rupees 2,000 per year in four equal instalments. My husband will get the said allowance so long as he will live. On his death

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none of his heirs shall get the said money, and he shall not be competent to transfer in any way or sell his right to get the said money, and the same shall not be liable to be attached or sold for his debt. If the enjoyers of the properties fail to pay the said amount according to the instalment, then my husband will be competent to realize the same from the enjoyers of the properties with interest at 8 annas per cent. per month out of the properties left by me.

"6. As regards such of my moveable and immoveable properties, claims and arrears of rent, etc., as will remain after excluding the immoveable properties of Schedules (Ka), (Kha), (Ga) and (Gha), and after the division in three equal shares, as provided herein, of the cash Tahabil, G.P. Notes, and loans, and paying the legacies, and leaving out the amounts to be reserved in the hands of the executrix for carrying out the works provided for above and which cannot be performed within six months, the persons named in paragraph 7 will get the properties described therein, and of the immoveable properties, the right of enjoyment of my dwelling-house shall be regulated by the provisions of paragraph 8. The right of enjoyment and ownership of all the remaining moveable properties except the moveable property described in paragraph 7, and of all the remaining immoveable properties, except the dwelling-house, which is to be controlled by the rules provided in paragraph 8, shall devolve on the enjoyers of the properties in the following manner, that is to say, each one of my nieces will get in life-interest an one-third share of all the said residue of the moveable and immoveable properties. If at the time of my death any of my nieces be dead and her sons, or sons or grandsons of a deceased son, be alive, then they will get, in absolute right, the share of the said niece according to the rules of inheritance of the Hindu Shastras. And in the event of the death of any niece without leaving any male heir born of her line, such as son, grandson, etc., then her other two sisters, *i.e.*, my other two nieces, will get her share equally. If one of them be alive and the other dead then the male heirs of the dead niece born of her line, such as her sons, sons' sons, etc., will, according to the rules of inheritance, get the share which this niece would have been entitled to, and in the absence of any such male heir the only surviving niece will get the said share; and if she, too, be not alive then her male heirs belonging to her line such as sons and sons' sons, etc., will get the said share. The husband, daughter or daughter's children of any niece shall not get her share."

No other portion of the will appears to their Lordships to be of assistance in the solution of the questions discussed before them.

The testatrix died on the 27th April, 1920. Her three nieces all survived her, but the niece Indumayi Debi died on the 29th August, 1920, leaving three sons. She, therefore, did not die "without leaving any male heir born of her line."

It is the death of Indumayi which has given rise to the present difficulty. The beneficial interest of Indumayi Debi in a third share terminated with her death. Is there a gift over of that share to anyone either expressly or by implication? or does the share devolve as on an intestacy?

The Subordinate Judge held in reference to clause 6 of the will, that—

"The provision that the two other nieces remaining alive on the death of her other niece (without any limitation regarding the time of her death) should get her share only in case she dies without male descendants, goes clearly to show that if she leaves male descendants they are to get her share."

In other words, he finds an implied gift in favour of the male descendants of Indumayi, or, as he expresses it later:

"On consideration of the context of the Will, I find that the real intention of the testatrix was that on the death of any of her three nieces who survived her, the share for life left to her out of the residuary immoveable estate was to vest absolutely in her male descendants according to rules of inheritance under Hindu law."

A decree was accordingly made upon the footing that no intestacy had occurred.

This decree save in so far as it related to costs, was affirmed by the High Court, but as it appears to their Lordships upon different grounds. The Judges in the High Court construed clause 5 of the Will as containing a gift of the property to the three nieces and their sons, who were to form the whole body of residuary legatees. As to clause 6 their view was thus expressed:

"What effect then should be given to paragraph 6 of the Will? In my judgment, paragraph 6, following paragraph 5, only gives directions as to how the residue should be possessed by the different residuary legatees, in other words, how the interest should be divided between the nieces and their sons, *i.e.*, it says that the nieces would only get life-interest, and necessarily it follows that what is left would belong to their various descendants according to the limitation in the Will. And then the provision follows that if any of the nieces dies before the testatrix what would happen to her share of the property. In this view of the construction of the Will there is no contradiction between one clause and the other and the entire dispositions made under the Will may be reconciled without any difficulty."

In the opinion of their Lordships it is not possible to construe clause 5 as containing any gift of the property covered by clause 6 in favour of any person. It only in terms refers to two-thirds of the immoveable property covered by clause 6, and in relation to the property to which it does refer, clause 5 is in form narrative only. The object of clause 5 is to provide a life annuity to the husband of the testatrix, and it may with sufficient accuracy be paraphrased thus:

"So long as the estate is undistributed my executrix is to pay Rs. 6,000 per year to my husband. After my executrix has (according to clause 6) handed over two-thirds of the immoveable property to her two sisters, or to any of her sisters, and, in case any of her sisters being dead, to the dead sisters' sons, the persons enjoying the properties shall be bound to pay Rs. 6,000."

Their Lordships are unable to agree with the reasons given by the High Court. Nor do they feel able to imply any gift in

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favour of the male descendants of Indumayi Debi. The portion of clause 6 of the Will which commences with the words "And in the event of the death of any niece without leaving any male heir," is the only possible provision in the Will under which such a gift could be implied in favour of male heirs who survived the niece. But even then, the gift could only be implied if the death of the niece took place at a time to which the clause relates. It becomes necessary, therefore, to consider whether the clause relates to death at any time or at some particular time.

Although a reference to death will, *prima facie,* refer to death at any time, the wording of clause 6 seems to their Lordships to confine that provision to death in the lifetime of the testatrix. Upon no other hypothesis does it seem possible to account for the testatrix (after giving the share to the other two nieces, and, in certain events, to "the only surviving niece'') then proceeding to dispose of the share on the footing that "the only surviving niece" is herself dead. Upon the particular wording of this Will their Lordships think that this reference to death must be taken to be a reference to death in the lifetime of the testatrix.

Difficult as it would be to imply the suggested gift if the clause had referred to death at any time, it is in the opinion of their Lordships impossible to make the implication if the clause is confined, as they think it must be, to death in the lifetime of the testatrix.

Their Lordships derive no assistance from any authorities in the construction of the very special language employed in this particular will. The result is that the testatrix has not in the events which have happened made any disposition after the death of Indumayi Debi of the share in which, under clause 6, she had a life-interest, but has died intestate in respect thereof. The same reasoning will apply to the other two shares in which Jyotimayi Debi and Taritmayi Debi the first and third respondents took similar interests, though their life-estates are still subsisting.

Their Lordships are of opinion that this appeal should be allowed, and that it should be declared that as regards the one-third share of the property in which, under clause 6 of the will, Indumayi Debi had a life-interest and subject to such life-interest, the testatrix died intestate in respect thereof. There should also be a similar declaration in the case of the other

two shares. The costs of all parties of this appeal will be paid out of the estate of the testatrix.

The case will be remitted to the High Court in order that the necessary variations in the existing order, including and consequent upon such declarations, may be made.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *W. W. Box & Co.*

Solicitors for respondents: *Watkins & Hunter.*

K.J.R. *Appeal allowed.*

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PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD THANKERTON, LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Jahandad Khan and others .. *Appellants**

v.

Khan Bahadur Abdul Ghafur Khan .. *Respondent.*

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Adverse possession, title by—Waste and uncultivated land—Burden of proof.

In a suit by the plaintiff to establish a right by adverse possession to a Bela (a *chur* or an island of waste ground), the onus is on him to establish affirmatively his adverse possession for 12 years preceding the suit. The possession which he is required to prove must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor; and though there may be special difficulty in establishing this in the case of waste or uncultivated jungle land, the onus nevertheless lies upon the plaintiff to prove affirmatively his exclusive possession of the Bela for the requisite period of 12 years.

Held, that, having regard to the revenue entries in which possession was throughout shown as being with the defendants, and the other evidence on the record, the plaintiff had failed to discharge the onus that lay upon him.

Radhamoni Debi v. *Collector of Khulna*, (1900) L.R. 27 I.A. 136 at 140: I.L.R. 27 C. 943 (P.C.) and *Kuthali Moothavar* v. *Peringati Kunharankutty*, (1921) L.R. 48 I.A. 395 at 402: I.L.R. 44 M. 883: 41 M.L.J. 650 (P.C.), referred to.

Judgment of the Judicial Commissioner reversed.

Appeal No. 68 of 1928 from a decree of the Judicial Commissioner for the North-West Frontier Province, Peshawar, dated the 3rd February, 1927, which reversed a decree of the District Judge of Peshawar, dated the 17th July, 1924, and decreed the plaintiff's suit with costs.

*P.C. Appeal No. 68 of 1928. 17th June, 1930.

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Sir George Lowndes.

The material facts of the case are set out in their Lordships' judgment.

De Gruyther, K.C. and *Parikh* for appellants.

Dunne, K.C. and *Wallach* for respondent.

17th June, 1930. Their Lordships' judgment was delivered by

SIR GEORGE LOWNDES.—The Khans of Zaida and Hund are owners of adjacent landed estates on the bank of the Indus. Near by and situated between two branches of the river is an island of waste ground, a portion of which, comprising about 20 acres, is covered with shisham trees of considerable value. This plot is known as Bela Fakir Buti, and now bears survey number 2084, but is unassessed. The part of the island in which the Bela lies is just opposite to a bungalow belonging to the Khan of Zaida in the village of Rana Dheri, and has for long been a subject of dispute between the rival estates. Prior to 1875 the Bela, together with most of the rest of the island, then bearing Khasra numbers 1—6, was entered in the revenue records as the property and in the possession of Zaida. In that year the Khan of Hund instituted a suit in respect of this area, claiming both title and possession, and praying that it might be recorded as his property. His suit succeeded; it was held that the area claimed was part of the Hund estate, and it was ordered that the Revenue authorities should make the necessary entry in the settlement papers. The decree also directed possession to be given, but there is no evidence that this was done.

In the present proceedings it is only the Bela that is in dispute. It is admitted that it was part of the area covered by the decision of the 1875 suit, and it is clear, therefore, that so far as the claim of Zaida is based upon title, it must fail.

The real question in the case, however, is whether the Khan of Zaida has established a right to the Bela by adverse possession. The suit out of which this appeal has arisen followed upon proceedings taken under section 145 of the Criminal Procedure Code. In 1922, the Khan of Zaida commenced to fell trees on the Bela and his men were forcibly evicted by the Khans of Hund. The Khan of Zaida then applied to the District Magistrate under the section above referred to, alleging that he was in possession, and praying for reinstatement and protection. The District Magistrate held an enquiry and came to the conclusion that ownership and possession were with Hund.

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Thereupon the suit was instituted by the Khan of Zaida praying for a declaration of his title and for possession.

Under these circumstances it lay upon him to establish affirmatively his adverse possession of the Bela for 12 years prior to 1922. The District Judge of Peshawar, by whom the suit was tried, held that he had not done so, and dismissed his suit. The Judicial Commissioner, on appeal, held that he had, and gave him a decree for possession as owner. The Khans of Hund now appeal to His Majesty in Council. The Khan of Zaida is the respondent.

The possession which the respondent is required to prove "must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor" (*per* Lord Robertson, in delivering the judgment of the Board in *Radhamoni Debi* v. *Collector of Khulna*.[1]) Their Lordships think that there is special difficulty in establishing this in the case of uncultivated jungle land such as the Bela in dispute, which produces nothing beyond self-sown trees and a seasonal crop of wild grass: see the remarks of Lord Shaw in *Kuthali Moothavar* v. *Peringati Kunharankutty*.[2]

There is, as might be expected in such a case, a mass of oral evidence on both sides, most of which is unsatisfying. Standing out from it is the evidence of the Government records, in which, apparently from 1891, and certainly from 1895 right down to 1922, when the present dispute arose, possession is shown as being with the appellants. It is not disputed that these records come within the terms of section 44 of Act XVII of 1887, and, therefore, that the entries of the appellants' possession must be presumed to be true until the contrary is proved.

In the course of the settlement proceedings of 1894 the old dispute between the two estates was reopened, and the settlement collector ordered all the land except certain plots, which admittedly do not include the Bela in dispute, to be entered as the property and as in the possession of Hund. This order was carried out by the records above referred to. It is clear that the respondent was a party to and fully informed of these proceedings, but he took no steps thereafter to establish his title, though his case even now is that his possession had continued undisturbed after and in despite of the 1875 decree. The Patwari of Hund, who had held office from 1919, and whose duty it was to inspect twice a year every survey number

1. (1900) L.R. 27 I.A. 136 at 140: I.L.R. 27 C. 943 (P.C.).
2. (1921) L.R. 48 I.A. 395 at 402: I.L.R. 44 M. 883: 41 M.L.J. 650 (P.C.).

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in his circle and to enter, with other particulars, in whose possession they were, was a witness in the case. In addition to vouching the Government records he deposed to having found at his biennial inspections prior to 1922 men from Hund in possession of the Bela. The Trial Judge attached considerable weight to his evidence, supported as it was by the records, and their Lordships think that he was right in so doing, and that the Judicial Commissioner who disagreed with him on this point failed to appreciate its true significance. Entries of possession would be open to the inspection of the respondent, who was not merely an educated man, but a first grade District Judge, and their Lordships find it hard to believe that if he had in fact been in open and continuous possession of the Bela for a number of years, a man of his position and experience would have allowed such entries to pass unchallenged. This would, their Lordships think, be the more remarkable if, as the respondent stated in his application to the District Magistrate in 1922, the appellants and their ancestors had been "incessantly trying to secure possession of the Bela from 1875."

Under these circumstances their Lordships must hold that it would require very clear and definite evidence of possession by the respondent to discharge the onus which is upon him. Their Lordships doubt whether the Judicial Commissioner approached this question in the right way. He seems rather to have thought that where both sides gave evidence of possession it was sufficient for him to be satisfied that the evidence adduced for the respondent was more worthy of credit than that on the other side. He says that "though none of the individual points" upon which the respondent relied "may be very strong, yet the cumulative effect of all of them is sufficient to discharge the initial burden of proof which lay upon the plaintiff," and that "this being so it is for the defendants to show that they have maintained their title and have not been excluded by the plaintiff."

It is impossible for their Lordships to accept this as the true criterion in such a case. The only question can be whether the respondent has established affirmatively his exclusive possession of the Bela for the requisite period of 12 years, and this, in their Lordships' opinion, he has failed to do.

Their Lordships have been taken through all the evidence upon which the respondent's counsel relies, and they have come to the conclusion that taken with the other facts, to which reference has already been made, it falls short of establishing

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his case. The cutting of trees by the respondent does not go back beyond 1916, and it is at least noteworthy that as soon as felling was planned on any large scale the appellants interfered. The marking of the trees to which one witness deposes is not even referred to by the respondent in his examination, and if it in fact took place may be ascribed to no earlier date. The grazing and carrying away of grass and the cutting of firewood could be little more than sporadic invasions of a conveniently adjacent jungle. The temporary occupation by a fakir with the respondent's permission is of no real significance. The absence from the long tale of witnesses of Shera, who is said to have been employed by the respondent for eight or nine years as his custodian of the Bela, and whose evidence would have been most material, is altogether unexplained. The fact that in 1911 the respondent succeeded in establishing his title by adverse possession to certain cultivated plots on the other side of the river which were within the Hund boundary, is clearly no evidence of his possession of the Bela.

Their Lordships think that the Trial Judge approached his examination of the case from the right point of view, and that he came to a correct conclusion upon the evidence. They think that the decree of the Judicial Commissioner should be set aside, and that of the District Judge restored, and they will humbly advise His Majesty accordingly. The respondent must pay the costs before the Judicial Commissioner and here.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitor for respondent: *H. S. L. Polak.*

K.J.R. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice*, MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

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S. P. S. Ramaswami Chettiar, Karaikudi, and others .. *Petitioners**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Indian Income-tax Act (*XI of* 1922), *S.* 10, *Sub-sec.* (2)—*Loss due to*

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* O.P. No. 275 of 1928. 1st May, 1930.

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theft by persons unconnected with business—If allowable in computing profits.

Held, by the Full Bench, *The Chief Justice* and *Curgenven, J.* (*Anantakrishna Aiyar, J.,* dissenting): Loss incurred by the assessee due to theft by persons unconnected with his business cannot be said to be incidental to the business of a money-lender. It cannot, therefore, be deducted in computing his taxable profits.

Cases of embezzlement by employees stand on a different footing.

Anantakrishna Aiyar, J.—What should be considered as "stock-in-trade" should be decided with regard to the nature of the business and other circumstances. It is well known that Nattukottai Chetties carry on their business even after the usual banking hours. Monies kept for purposes of their trade after such office hours are monies kept in the usual course of business as part of the stock-in-trade. A loss of such monies by theft is a risk incidental to the money-lending business and should, therefore, be allowed.

This conclusion is supported by the analogy of allowances made in practice, for losses sustained by Railway administrations and other common carriers by way of compensation paid for accidents to passengers, for damages awarded to an employee for wrongful dismissal, for defalcations of employees, and for loss by flood or tempest.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

In accordance with the High Court's order I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under section 66 (3).

2. The facts are as follows:—The petitioners are a registered firm carrying on banking business at Karaikudi, Kayan, Moulmeingyun and Einme in British India and at Kuala Lampur in Federated Malay States with their headquarters at Karaikudi in the Ramnad District within the jurisdiction of the Income-tax Officer, Karaikudi, I Circle.

3. On the night of 21st October, 1926, certain persons broke into the strong-room of a house at Moulmeingyun occupied by the petitioners and by two other firms, and stole cash and currency notes of the value of Rs. 9,335, besides certain jewels not now in question. On 5th August, 1927, four persons were convicted of the said offence by the Special Power Magistrate, Myaungmya. One of these persons had been employed as a cook at the abovementioned premises, but was not so employed at the time of the offence. This person was convicted in addition under section 328, Indian Penal Code, of administering drugs to the inmates of the house to facilitate the commission of the theft. Adjoining the house were a kitchen and cattle-shed and it may be taken that the house was used partly for the business of the firm and partly as a residence.

4. The petitioners claimed that this sum of Rs. 9,335 should be allowed as expenditure in computing the profits of their Moulmeingyun branch. The claim was disallowed on the ground that the loss was of a capital nature. On application being made to

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me to state a case to the High Court, it appeared to me that the sum in question had not been lost or expended in the course of the petitioners' business, and that in this state of the facts no question of law could arise.

5. In the above order the High Court has directed me to refer the following question:—

"Whether the loss incurred by theft of money used in the money-lending business and in the business premises should be allowed for in computing the income-tax."

6. The deductions to be allowed in computing the profits of a business are described in Section 10, Sub-section (2) of the Indian Income-tax Act (XI of 1922). In my opinion the deduction now claimed is not covered by any one of the provisions of that sub-section. Clauses (*i*) to (*viii*) refer to rent, cost of repairs, interest on capital, insurance premium, allowance for depreciation, land revenue and local taxes. The present claim does not come under any of these descriptions. Clause (*ix*) refers to "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." The sum claimed here is not money expended or laid out. It is not expenditure, but an accidental loss. I do not consider that a loss is a kind of expenditure, but even if I am wrong in this it cannot be said that this loss was "incurred solely for the purpose" of earning the profits and gains of the business.

7. In my opinion the loss was not one incurred in the business at all. The petitioners quote the analogy of money lent out and found to be irrecoverable. But the loss of money lent out is, in my opinion, a result of business transactions, whereas the loss now claimed is due to an occurrence which was not part of the business at all and had nothing to do with it. It is also claimed that this loss should be allowed because a loss due to embezzlement by an employee is allowable. The decision reported in *Jagarnath Therani* v. *Commissioner of Income-tax, Bihar and Orissa*[1] is quoted in this connection. The ground of that decision is that the loss "springs directly from the necessity of deputing certain duties to an employee," in other words, is one incurred in the course of the business. It seems to follow from this that a loss due to theft committed by persons unconnected with the business is not allowable.

V. Rajagopala Aiyar for petitioners.

M. Patanjali Sastri for respondent.

The Court delivered the following

JUDGMENTS. *Beasley, C.J.*—The facts in this case have been sufficiently set out in the answers to the question referred to us of my learned brothers Anantakrishna Aiyar and

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1. (1925) 2 I.T.C. 4.

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Curgenven, JJ., which I have had the advantage of seeing and I therefore do not propose to state them. The question seems to me to resolve itself into one as to whether the loss sustained by the assessee in this case was one which can be described as incidental to his business. If it was, then he is entitled to have his profits upon which he is liable to pay income-tax reduced by the amount of that loss. It was argued for the assessee (1) that the robbery of the assessee's money was one which was incidental to his business of a money-lender, and (2) that the money stolen was his "stock-in-trade," because it was money which, had it not been stolen, was available to him for the purpose of lending to borrowers and making a profit thereby. There is no evidence in this case that this sum was "stock-in-trade'' at all and the money would seem to me to be capital *plus* the profits collected by the assessee. If this money was capital, then the assessee would not be entitled to a deduction on account of its loss. So far as the money stolen was the profit of the assessee, unless it can be shown that its loss was incidental to the business he carried on, he cannot claim a deduction in respect of it. If any one is paid a sum due to him as profits and he puts that in his pocket and on his way home is robbed of it, it would be, I think, difficult to contend that such a loss was incidental to his business. Still more so when he has reached his home and put those profits in a strong room or some other place regarded by him to be a place of safety. I can well understand that in cases where the collection of profits or payment of debts due is entrusted to a gumastah or servant for collection and that person runs away with the money or otherwise improperly deals with it, the assessee should be allowed a deduction because such a loss as that would be incidental to his business. He has to employ servants for the purpose of collecting sums of money due to him and there is the risk that such servant may prove to be dishonest and instead of paying the profits over to him convert them to his own use. But I cannot distinguish the present case from the case of any professional man or trader who, having collected his profits, is subsequently robbed of them by a stranger to his business. In this case none of the thieves were the then servants of the assessee although one of them had formerly been his cook. This is no doubt a very hard case and, whilst I have every sympathy with the assessee, I am unable to answer the question except in the negative. The question referred to us is rather too general but upon the facts of this case which, in my opinion, are not at all adequately set out, that must be my answer.

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The result is that the answer of this Full Bench is in the negative and the assessee is directed to pay the costs of the Income-tax Commissioner which we fix at Rs. 250.

Anantakrishna Aiyar, J.—I have the misfortune in this case to differ from the opinion of my Lord the learned Chief Justice, and of my learned brother Curgenven, J.

The question referred for our decision under section 66 of the Indian Income-tax Act is "Whether the loss incurred by theft of money used in the money-lending business, and in the business premises should be allowed for in computing the income-tax."

The question raised is one of very great importance, and the case is one of first impression, no case directly deciding the point having been brought to our attention.

One should have liked that more facts were available; the facts, as they appear in the records before us, are the following:—

The petitioners are a registered firm of Nattukottai Chetties carrying on money-lending business at Karaikudi and other places in British India, and at Kuala Lampur in Federated Malay States, the headquarters being at Karaikudi in the Ramnad District. On the night of the 21st October, 1926, certain persons broke into the strong room of the house at Moulmeingyun (Burma) occupied by the petitioners and by two other firms, and stole cash and currency notes of the value of Rs. 9,335 besides certain jewels which had been pledged with the firm, as security, by certain customers. On 5th August, 1927, four persons were convicted of the said offence by the Magistrate. One of these persons had been employed as a cook at the abovementioned premises. Though he was not so employed at the time of the offence, he was convicted, in addition, under section 328, Indian Penal Code, of administering drugs to the inmates of the house to facilitate the commission of the theft. The Commissioner of Income-tax stated that he had since the decision of the Income-tax Officer ascertained that the loss of the cash and the jewels was genuine. He, however, was of opinion that there was no provision of law under which the assessees would be entitled to deduction claimed in respect of the cash and currency notes, that the loss could neither be said to be a business loss nor expenditure incurred for earning profits; and that the loss in question is loss of capital. The decision in *Jagarnath Therani* v. *Commissioner of Income-tax, Bihar*

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and Orissa[1] was distinguished on the ground that the loss in the present case could not be said to have been incurred in the business at all, and that such a loss could not be said to have been incurred solely for the purpose of earning the profits and gains of the business. He, therefore, held that the loss due to theft committed by persons unconnected with the business is not allowable as a deduction.

The learned Counsel who appeared in support of the assessment argued that the allowance now claimed could not be brought under any one of the clauses of section 10 of the Act, which, he argued, exhausted the headings under which allowances could be claimed by assessees. I am unable to accede to that contention. Section 10, no doubt, directs that the allowances mentioned in the section should be made in favour of the assessee; but in my view it does not necessarily follow that the assessee is not entitled to the allowance now in question simply because it is not specifically mentioned in section 10. Under clause 1 of section 10, tax is payable only in respect of the profits or gains of any business carried on by the assessee. The Court has to find out what the profits or gains of the business amounted to. In the absence of any specific provisions in the Act, the profits or gains of a business have to be ascertained by the ordinary commercial methods. If the argument advanced on behalf of the Crown be accepted, it would follow that no allowance could be claimed for instance for bad debts actually written off during the year, since there is no specific provision in section 10 for allowing such deduction. But it could not be, and in fact was not, contended that allowance should not be made for such bad debts. The practice of making allowance for such bad debts has become firmly established. As the Court has to find out the amount of profits or gains of the business during the period, the question arises whether the loss by theft in question should be deducted when the profits are ascertained.

As pointed out in Konstam's book,

"The net profits of the trade or business should be computed by reasonable business methods, subject to any specific directions contained in the Income-tax Act."

Lord Herschell observed in *Russell* v. *Town and County Bank*[2] as follows:

"The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the

1. (1925) 2 I.T.C. 4. 2. (1888) 13 A.C. 418 at 424.

purpose of earning those receipts. . . . Unless and until you have ascertained that there is such a balance, nothing exists to which the name 'profits' can properly be applied."

Similar observations were made by Lord Parker in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*[2]:

"Where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed. . . provided there is no prohibition against such an allowance."

It was argued for the assessee that the allowance claimed would come under section 10 (2) (*ix*):

"Any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

It was also argued that in the case of money-lending business of Nattukottai Chetties, the loss in question must be taken to be loss of stock-in-trade. On the other side, it was argued for the Crown that the loss in question could not be said to be an expenditure incurred, much less, solely, for the purpose of earning such profits or gains, and that in any event it should be taken to be expenditure in the nature of "capital" expenditure. It was also argued that the monies in question could not be said to be "stock-in-trade" in the ordinary sense of the expression. Having regard to the way in which such people carry on their money-lending business, it would seem to be essential for the successful carrying on of their business to have cash with them even after "the usual banking hours". They carry on their business operations, as is well known, even after the offices of the European Banks are closed for business for the day. Keeping monies with them for purposes of their trade after such office hours could not, therefore, in my view, be said to be anything else than keeping monies in the usual course of their business. The profits made by them by doing business after the usual office banking hours are surely liable to income-tax. The finding, as I understand it, is that in the usual course of business the remaining cash, etc., on hand and the jewels received on pledge from the customers were kept in the "strong room" of the business premises, and that thieves broke into the strong room and stole the cash and currency notes and the jewels. The fact of theft having been found, I think that the loss in question should be taken to be a loss connected with or arising out of the money-lending trade or business of the assessees. With reference to the jewels thus lost, the Income-tax authorities have, and, in my opinion, rightly, made allowance; but I think that allowance should be made also for the cash and currency notes amounting to Rs. 9,335

2. (1915) A.C. 433 at 458.

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thus lost. I am unable to agree with the contention of the Crown that the loss in question, should, if at all, be taken to be loss of "capital". It is true, as pointed out on behalf of the assessees, that the profits of the Moulmeingyun business for the period in question was computed by the Income-tax authorities to be over Rs. 20,000. But that circumstance by itself is no ground for holding that the item in question should be taken as loss of profits, and not loss of capital. Whether a particular item is really capital expenditure or not has to be decided having regard to various considerations. Of course it is well established that when once profits have been earned during the period, it does not matter how the same is dealt with subsequently.

I am inclined to the view that in the case before us, the cash and currency notes, etc., lost, should be taken to be "stock-in-trade" of the assessee's business. What should be considered as stock-in-trade of a business should be decided after having regard to the nature of the particular business, its requirements, and other circumstances essentially connected with the successful carrying out of the particular business.

In *Punjab National Bank* v. *Commissioner of Income-tax*[3] the question was raised whether allowance should be made for depreciation in the case of certain Government securities held by a firm. The answer would depend on the question whether those securities were held by the firm (Bank) with the object of dealing with them from day to day in the ordinary course of its business including that of buying and selling Government securities in the usual course, or whether such Government securities were purchased by the firm (Bank) with the object of constituting the same as a sort of reserve in lieu of cash. In the case of the former, allowance should be made for depreciation (the reason being that the Government securities should, in such a case, be treated as "stock-in-trade" of the Bank); but not in the case of the latter.

In the case of money-lending business such as the one before us, I think that the reasonable view to take as regards stock-in-trade is the one indicated by me before.

The decision in *Jagarnath Therani* v. *Commissioner of Income-tax, Bihar and Orissa*[1], so far as it goes, also supports this view. There, some money was entrusted to a gumastha of a firm in the usual course

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1. (1925) 2 I.T.C. 4.
3. (1926) I.L.R. 7 L. 227: 2 I.T.C. 184.

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of business with instructions to pay the same to a creditor of the firm. The gumastha embezzled the monies. He was criminally prosecuted, but was acquitted, his defence being that he was robbed of the money. The case in *Jagarnath Therani* v. *Commissioner of Income-tax, Bihar and Orissa*[1], however, was comparatively a plainer case than the one before us, and the Court, if one may say so with respect, very properly held that the loss was connected with and arose out of the business, and was not *prima facie* a loss in the nature of capital expenditure.

On behalf of the assessees, the decision of Rowlatt, J., in *Curtis* v. *J. & Y. Oldfield, Ltd.*[4], was referred to before us. At page 330 the learned Judge observed as follows:—

"I quite think, with Mr. Latter, that if you have a business, in the course of which you have to employ subordinates, and owing to the negligence or the dishonesty of the subordinates, some of the receipts of the business do not find their way into the till, or some of the bills are not collected at all, or something of that sort, that may be an expense connected with and arising out of the trade in the most complete sense of the word."

Stress was laid on the words "something of that sort" occurring in that judgment. But the words are too wide and one cannot be certain that the learned Judge had a case like the present in his view. Too much importance should not, I think, be attached to the above observation in the circumstances. It was argued on behalf of the Crown that theft should not be taken to be anything connected with or arising out of the assessee's money-lending business. In my view that is stating the position rather too broadly. In the case of Railway Administrations and other common carriers, the practice seems to be to make allowance for losses sustained by them in compensating passengers for accidents in travelling over the railway, etc. That the practice is to make such allowance in favour of common carriers is taken for granted in the judgment of Lord Loreburn, L.C., in *Strong and Company, Ltd.* v. *Woodifield.*[5] At page 452 the Lord Chancellor observed as follows:—

"In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration,

1. (1925) 2 I.T.C. 4.
4. 9 T.C. 319.
5. (1906) A.C. 448: 5 T.C. 215.

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losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted."

If losses sustained by a railway company in compensating passengers for accidents in travelling over its line could be deducted, it would seem to follow that losses similarly sustained by a railway company in compensating owners and consignees of goods entrusted to them for carriage, but which were lost during transit by theft, could also be deducted in proper cases. That could seem to resemble the present case, and the observations by the Lord Chancellor, I think *prima facie*, support the contention of the assessee before us.

No doubt the further observations made by the Lord Chancellor should also be kept in view. It was remarked later on at page 452:

"Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise."

The loss must be something in the nature of a commercial loss. Whether a particular loss is of that nature or not would have to be decided with reference to all the circumstances of a case. In *Royal Insurance Co.* v. *Watson*[6] Lord Shand expressed the opinion that damages awarded to an employee for wrongful dismissal would be allowable as a deduction. Damages for libel against a newspaper proprietor would appear to be loss in the ordinary course of business of proprietors of newspapers. *See* Pratt and Redman's Income-tax Law, 10th Edition, page 112.

To the argument urged on behalf of the Crown that it is no part of the assessee's business to deal with thefts, the following observations of Lord Buckmaster in *Glikstein & Son, Ltd.* v. *Green*[7] may be referred to. There, the question was whether the amount received by a firm of timber merchants from fire insurance companies in respect of stock of timber destroyed by fire could be assessed to income-tax. At page 384 Lord Buckmaster observed as follows:—

"If this results in a gain, as it has done, it appears to me to be an ordinary gain—a gain which has taken place in the course of their trade—none the less because, as Mr. Macmillan put it, and as I think Sir John Simon before him appears to have put it, it is no part of a timber merchant's business to trade in fires."

If, in the present case the stock-in-trade of the assessees before us including balance on hand each day and the jewels, etc., received on pledge from customers, had been insured at a particular figure against fire or theft, and the amount was

6. (1896-7) A.C. 1. 7. (1929) A.C. 381: 14 T.C. 365.

accordingly received from the insurers on the occurrence of fire or theft, then the amount so received would, according to the decision in *Glikstein & Son, Ltd.* v. *Green*[7] be *prima facie* taxable. The premia paid in respect of such insurance is allowed to the assessee [*see* S. 10 (2) (*iv*)], and in return, the amount received by the assessee from the insurers would seem liable to be assessed to income-tax. If no insurance had been effected by the assessees, no premium is paid and no allowance is made on account of premium; and in case of loss, the assessee receives no amount from insurers, and therefore no such amount could be included in the assessment. The reasoning would seem to lead to the conclusion that the loss even if uninsured should be deducted, as I have come to the conclusion that the loss is connected with the business and is really incidental to the trade itself, having regard to the nature of the trade or business of the assessee.

Turning to the English Text-Books on Income-tax Law, I find the following statements in Sanders' Income-tax, 3rd, edition. At page 310 it is stated that "a deduction is allowed in respect of employees' theft." At page 196, it is stated, that "loss from embezzlement is deductible." Similarly at page 163, "deduction is allowed in practice for the loss arising from defalcations of employees." At page 203, there are two passages which are rather important: "a deduction is permitted in practice for fire insurance premiums"; also, "loss of stock through fire is deductible in so far as it is not recovered by insurance, but loss of building does not form an admissible deduction." I also note that, "loss by flood or tempest" is allowed in case of assessments under Sch. A. The above statements, so far as they go, would seem to lend support to the assessees' contention in the present case.

Each case has to be decided with reference to the facts and circumstances relating thereto, and having regard to the nature and methods of trade or business in question. Having regard to the circumstances of the present case, and the findings of fact arrived at by the Income-tax Commissioner, I think that the assessees are entitled to the deduction of Rs. 9,335 claimed by them, and I would answer the question in the affirmative.

Curgenven, J.

Curgenven, J.—The question which the Commissioner refers is:

"Whether the loss incurred by theft of money used in the money-lending business and in the business premises should be allowed for in computing the income-tax."

7. (1929) A.C. 381: 14 T.C. 365.

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The Commissioner rightly observes that a loss of this character is not included within any of the deductions permissible under section 10 (2) of the Act. But that does not conclude the matter, because section 10 provides for the taxation of the profits of a business, and we have therefore to consider whether, in computing profits, the amount of such a loss may be deducted from them. It is settled, for instance, that a bad debt incurred by a money-lender may be so deducted, on the ground that it is a loss incidental to his business, so that it is fair, in assessing his net profits, to take account of losses as well as gains. Such a loss, it appears to me, must satisfy two conditions: (1) it must be a loss of part of the stock-in-trade of the business, and (2) it must be a loss of such a kind as is incidental to the business.

As regards (1), the question describes the money lost as "money used in the money-lending business," and taking this to mean money actually in use in the carrying on of the business, I feel no difficulty in holding that it was part of the money-lender's stock-in-trade. It may have included profits earned in previous transactions, but if those profits were themselves to be applied to the business, and were kept in hand for that purpose, they would not, I think, be any the less part of the stock-in-trade.

Requirement No. (2) presents greater difficulties, because I think it is clear that not all kinds of losses of stock-in-trade can be said to be incidental to the business. A loss, to be incidental, must be such as in the ordinary course, and having due regard to the peculiar risks attendant upon the conduct of the business, is likely from time to time to occur. Cases of embezzlement by subordinates, such as formed the subject of *Jagarnath Therani* v. *Commissioner of Income-tax, Bihar and Orissa*[1] would be losses of this nature, because the employment of clerks and servants is unavoidable, and the employer is likely, sooner or later, to be the victim of their dishonesty or negligence. That such a loss might be classed as a form of expense arising out of trade was recognised in *Curtis* v. *J. & Y. Oldfield, Ltd.*[4] although in the particular circumstances of that case, as I read it, the money lost no longer formed part of the stock-in-trade. The test whether the loss was, in the language of the English rule, "connected with or arising out of trade," was applied in two other English cases, *Strong & Co., Ltd.* v. *Woodifield*[5] and

1. (1925) 2 I.T.C. 4. 4. 9 T.C. 319.
5. (1906) A.C. 448: 5 T.C. 215.

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Inland Revenue Commissioners v. *Warnes & Co.*[8] The former related to damages claimed from an inn-keeper in respect of injuries caused to a customer by the falling of a chimney; the latter to a penalty incurred by a trading firm for negligently failing to observe certain conditions imposed during War-time on the export of goods to neutral countries. The loss was held, in the language of the English rule, to be a loss "not connected with or arising out of trade." These cases do not help us further than to show what manner of test should be applied. Now in the present case it may be conceded that a money-lender's business requires that he should keep a considerable sum in cash on his premises. Even if a bank is accessible to him, it would unduly restrict his activities to transact his affairs only within banking hours. The practice is certainly otherwise, and it is only fair to have regard to custom in deciding what the exigencies of a business require. That means that cash must be kept in a safe or strong room. The receptacle in the present case is described as a strong room and the question resolves itself into whether theft from a strong room may form the foundation of a claim to remission of tax. I exclude cases of theft by a clerk or servant employed in the business and having access to the strong room, because that is not in question here and special considerations might apply. In general, I am not prepared to say that theft by some external operator, with or without the complicity of domestic servants, ought to be recognised as the basis of a claim. To recognise it we must, I think, find not only that the cash had to be kept on the premises, but that its loss by theft was a circumstance which was so far probable as to be an occurrence incidental to, if not inseparable from, the manner in which it had to be kept. In my experience, the abstraction of money by theft from properly constructed safes or strong rooms is not within the competence of the ordinary thief or house-breaker, and we have not yet in this country to reckon with gangs of safe-breakers, such as may be found elsewhere. Perhaps the circumstance that no decision upon a case of this nature is to be found suggests the infrequency of such claims. The only test to apply, in order to see whether a loss of this kind is one incidental to the business, is, I think, the comparative likelihood of its occurrence, the requirements of the business being what they are. For example, injury to life and limb, and probably theft too, must occur sooner or later in the running of a railway. Bad debts

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8. (1919) 2 K.B. 444: 12 T.C. 227.

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and embezzlement have already been adverted to. Very likely the theft of stock-in-trade which have to be kept exposed to the public would fall into the same category. But I doubt whether cash kept in a safe should, if it should happen to be stolen, be allowed for.

We have not been furnished with any adequate narration of the facts of the present case, so that the question has had to be answered, as indeed it is put, in general terms. So considering it, I agree with my Lord in returning a reply in the negative.

S.R. *Reference answered in the negative.*

PRIVY COUNCIL.

[On appeal from the Court of Appeal for the Island of Malta.]

PRESENT:—LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE AND LORD THANKERTON.

Lord Strickland (in place of Alfredo Parnis) and others .. *Appellants**

v.

Giuseppe Grima (in place of Walter Agius, deceased) and others .. *Respondents.*

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Lord Strickland v. Giuseppe Grima.

Privy Council Appeal—Right of—Legislative Body—Election to membership of—Validity of—Decision as to—Appeal from—Malta Court of Appeal—Decision of—Malta Letters Patent, S. 33—Effect.

S. 33 of the Letters Patent of Malta provides: "All questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by Our Court of Appeal in Malta."

Held, on a construction of the section, that no appeal lay to the Privy Council from the judgment of the Court of Appeal in Malta deciding against the validity of the election of two of the appellants to be members of the Senate of Malta.

Appeal No. 64 of 1929 by special leave from a judgment of the Court of Appeal of Malta, dated 14th August, 1928.

H. P. Macmillan, K.C., Prof. A. B. Keith and *Davies* for appellants.

Sir Thomas Inskip, K.C. and *Dr. C. I. Colombos* for respondents.

23rd January, 1930. Their Lordships' judgment was delivered by

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LORD BLANESBURGH.—This appeal is concerned with the validity of the election in July, 1928, of two of the appellants, Messrs. Mifsud and Borg, to be members of the Senate of Malta, representatives there of the Trade Union Council of

*P.C. Appeal No. 64 of 1929. 23rd January, 1930.

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the Island. The Court of Appeal in Malta, by a judgment of August 14, 1928, has declared their election to be null and void and this is an appeal from that judgment.

A preliminary question of serious importance at once arises: viz., whether His Majesty can be advised further to entertain the appeal, and their Lordships, in the first instance at all events, must direct their minds to the consideration of that question to the exclusion of every other.

Although special leave to appeal had been granted by His Majesty in Council, it was recognised that it was not thereby intended that the Board, with all the facts before it, should be precluded from reconsidering whether the appeal was competent, and counsel on both sides before their Lordships agreed that that problem could only be satisfactorily solved after the Board had become seized of the history and nature of the controversy out of which it emerged. The arguments accordingly proceeded on that footing to their conclusion. Their Lordships will follow the same course, and before specifically dealing with this preliminary issue, will, without canvassing in detail the legal and constitutional questions discussed before them, give some account of the circumstances which have led up to the present situation.

Responsible self-government for Malta in internal affairs was in 1921 granted by His Majesty through the Malta Constitution Letters Patent, 1921. The Maltese Legislature thereby brought into existence consists of two Houses—the Senate and the Legislative Assembly. The Senate is a House of seventeen—seven general members and ten special members. Of these special members, two, nominated by the Archbishop of Malta, represent the clergy; two, the nobility; two, the graduates; two, the Chamber of Commerce, and two—and it is with these that this case is concerned—the Trade Union Council, a body so described in the Letters Patent. The method of electing the representatives of the nobility, the graduates, the Chamber of Commerce and the Trade Union Council, the registration of voters in and for any such classes and the conduct of such elections, are all matters under Art. 5 (3) of the Letters Patent, to be governed by such rules as may from time to time be determined by the nobility, the graduates, the Chamber of Commerce and the Trade Union Council respectively. It is apparently left to each of these orders to resolve how it shall be constituted for electoral purposes and particularly whether every member, say, of the Trade Union Council, must himself be a member of a constituent Trade Union. Art. 6 (1), however, in

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effect provides that no person may be elected as a special member of the Senate who is not himself qualified to vote at the election.

It was apparently assumed that at the date of the Letters Patent there was in Malta a Trade Union Council as definite in its constitution as the Chamber of Commerce. But in fact no such Council existed, and it became necessary in order to overcome the difficulty thus ensuing for the Governor to utilize the power conferred upon him by Art. 67 of the Letters Patent by which he is enabled to make to the Letters Patent within one year from their commencement, such additions as might be necessary in order to carry out their purposes.

Accordingly His Excellency with the previous consent of the Secretary of State by Proclamation, dated the 15th September, 1921, declared that the term "Trade Union Council" wherever used in Arts. 5-7 inclusive, of the Letters Patent, should mean a council or other body recognised by the Governor as representing the Trade Union Council of Malta for the purposes of the Letters Patent.

In pursuance of the powers so vested in him a Trade Union Council was recognised by the Governor on the 16th September, 1921, and that Council elected two representatives to the Senate. In 1924 these representatives resigned their seats, which, on September 30, 1926, were still vacant.

On that day a Government Notice was issued, No. 308 of 1926, making regulations for the purpose of constituting a Trade Union Council of Malta. These regulations provided for the appointment of a Registrar who was to compile a register of Trade Unions and each Trade Union so registered was to elect representatives to the Trade Union Council—one representative for every hundred of its members. The Governor was empowered to recognise the persons elected by the registered Trade Unions as the Malta Trade Union Council for the purposes of the Letters Patent and the persons thus recognised were to elect a president and a returning officer. By Article 14 it was provided that the Governor, on being apprised of the election of these officials, should immediately issue a writ to the Returning Officer commanding him to hold an election of two members to represent the Trade Union Council in the Senate. The Council recognised under these regulations was by Article 16 to remain in existence until the 31st December, 1928, and subsequent elections were to be held in the December of 1928, and of each subsequent year. The Government Notice of 16th September, 1921, was thereby cancelled.

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These regulations were, it appears, impugned by the President, the Secretary and the Returning Officer of the Trade Union Council as recognised in 1921, and an action was instituted by them to obtain a declaration of their invalidity. But it was brought before any election had taken place under the regulations, and for that reason it was held to be premature and it failed.

No further obstacle being put in the way of the regulations they were acted upon, and by Government Notice No. 93 of the 11th March, 1927, which is the basis of the case laid before their Lordships by the respondents, and now by the appellants as well, the body of persons in the Schedule termed the "Trade Union Council," whose names are there set out were recognised by His Excellency the officer administering the Government as representing the Trade Unions of Malta for the purposes of the Letters Patent. The Trade Union Council so recognised consisted of 24 members representing eight Unions. Of them, nine members represented the Unione Cattolica San Giuseppe, the appellant, Mr. Mifsud, being one of these, and amongst the seven other Unions represented were the Imperial Government Workers' Benefit Society and the Societa dei Piloti.

Thereafter on the 11th May, 1927, rules made by the Council so recognised for conducting the election of its two special members for the Senate were published in the Government Gazette, an election was held, and by a Government Notice of the 17th June, 1927, Mr. Walter Agius and the appellant Mr. Michel Angelo Borg were declared to have been duly elected members of the Senate.

Three days later, however, on the 20th June, 1927, the Senate and Legislative Assembly were dissolved by Proclamation and between June 25 and August 2, writs to the electing bodies to the Senate other than the Trade Union Council were issued. In reference to this Council, all the representatives thereon of the Unione Cattolica San Giuseppe (which will now be referred to as the Unione), except the appellant, Mr. Mifsud, had on the 22nd May, 1927, resigned from the Council; a note to their resignations signed by Mr. Mifsud stating that as he conscientiously felt that his conduct in the Council was absolutely correct, he found it impossible to resign unless he was asked to do so by those who sent him as their delegate in a general meeting legally convened. At a general meeting held on the 27th June, 1927—but which Mr. Mifsud says was both irregularly convened and held—the members present by resolu-

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tion purported to expel him from the Unione and struck his name off the Unione's representatives on the Council. On the 1st July, 1927, Mr. Mifsud wrote to the Governor setting forth his position in the matter and on the 8th July, 1927, he brought an action in the First Hall of the Civil Court against the President of the Unione impugning his expulsion. That action has never been brought to a hearing and is still pending.

Following upon the resolution of the 27th June, 1927, the Unione treated their entire representation on the Trade Union Council as vacant and on the 29th, 30th, and 31st July, 1927, they held a ballot for the election of their nine representatives. On the 1st August, 1927, the result of the ballot was intimated to the Minister of Justice, and by him as Head of the Ministry to the Governor: and by Government Notice No. 303 of 9th August, 1927, the nine persons so elected were recognised by His Excellency for the purposes of the Letters Patent, as the representatives on the Trade Union Council of the "Unione" in substitution for the delegates whose names had appeared in Government Notice No. 93 of the 11th March, 1927.

The appellant, Mr. Mifsud, was not one of those elected. He did not stand as a candidate—not perhaps unnaturally—although it would appear that under the regulations of September 30, 1926, his expulsion from the Unione, even if valid, would not technically have been a bar to his election. Their Lordships, however, have been more struck by another feature of this election. It is said that members of both political parties stood as candidates, and their Lordships have found nowhere in the voluminous record any suggestion that the election was, as an election, in any way irregular or that the gentlemen elected did not accurately and adequately reflect in their own opinions, the then views of the members of the Unione.

On the same day, but, as the Court of Appeal must be taken to have found, after that recognition by the Governor of the new representatives of the Unione had been published, the writ for the election of its two special members in the new Senate was issued to the Returning Officer of the Trade Union Council. The date originally fixed for the election was the 16th August, 1927. At the request of the Council this date was subsequently extended to the 25th August, 1927. On the 14th August, 1927, however, as the results of the General Election proceeding in the other Constituencies were showing that in the new Legislative Assembly, the then Ministry would be in a minority, Sir Ugo Mifsud, its head, tendered his resignation

to the Governor. This was accepted, and on the same day the appellant, Lord Strickland, was entrusted by the Governor with the duty of forming a new administration, a task which was completed on the 16th August, 1927.

Thereafter, on the same day, on the advice of his new Ministers, the Governor in Council, by Government Notice No. 323, revoked the regulations of September 30, 1926, and annulled all that had been done by virtue of the same. Four days later, by Government Notice No. 335, His Excellency recognised a new Trade Union Council, excluding therefrom representatives of the Unione, the Imperial Government Workers' Benefit Society and the Societa dei Piloti—and adding delegates of the National Farmers' Union, the National Union of Seamen and the Union of Dockyard Employees. The election writ of the 9th August, 1927, was withdrawn, and on September 2, 1927, a new writ was issued for the election by the Trades Union Council, as now recognised, of its two representatives on the Senate. In the result, by Notice No. 370 of the 19th September, 1927, it was announced that Colonel Savona and the appellant, Mr. Borg, had been returned without opposition as these representatives.

This election was at once impugned by the respondents other than Mr. Grima and in an action for the purpose was by judgment of the Court of Appeal, dated December 5, 1927, declared null and void. The Court of Appeal, in giving its reasons therefor, expressed the view that the issue of the writ by the Governor and the fixing of the dates for the different stages of the election procedure must be held to constitute the commencement of the election: that once a Trade Union Council had been recognised by the Governor for the purposes of a given election, he could not recognise another Council if that election had commenced but had not been concluded, and that the only body competent to elect its two representatives for the two seats rendered vacant by the dissolution of Parliament was the Trade Union Council recognised by the Governor under the Government Notices Nos. 93 and 303 of 1927.

Leave to appeal to His Majesty in Council having been refused by the Court of Appeal, and on the 17th May, 1928, by His Majesty in Council, that judgment is now final and binding.

The appellant, Lord Strickland, as head of the Ministry, and his colleagues thereupon came to the conclusion, and, as they suggest, rightly, that their proper course, as that most in accordance with the principle in the Court of Appeal's judg-

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ment, was to cause the election of the two senators representing the Trade Union Council to be held by that Council as recognised at the time of the dissolution of Parliament on the 20th June, 1927, *i.e.*, by the persons whose names were scheduled to Government Notice No. 93 of the 11th March, 1927, and by them only. Accordingly, Government Notices Nos. 163 and 168, of the 19th and 21st June, 1928, were issued to the delegates whose names were so scheduled, directing them to choose a Returning Officer to whom a fresh writ might be issued for the election of the representatives of the Trade Union Council in the Senate; and ultimately a writ for the election of these two representatives was, on the 25th June, 1928, issued to the Returning Officer who had been so chosen. The election took place, and resulted as published on the 6th July, 1928, in the appellants, Mr. Mifsud and Mr. Borg, being declared to have been returned uncontested. This is the election now impugned, and it is convenient to note before going further that at the first of the two elections advised by the new Government, both the appellant, Mr. Mifsud, as its representative, and the Unione were disfranchised altogther; while at the second Mr. Mifsud, although not amongst those chosen on the 9th August, 1927, was the sole effective representative of the Unione, the other eight representatives named in Notice No. 93 having disappeared, as above appears, by resignation.

The challenge of this second election was immediate. It was made in this action brought in the Court of Appeal on the 5th July, 1928, by the respondents, Mr. Agius and Mr. Grima, on behalf of the Trade Union Council as a whole, and Dr. Mizzi as President and delegate of the Societa dei Piloti, and by a unanimous judgment of that Court, delivered on the 14th August, 1928, it was held, as it had been held on the occasion of the previous election, that the only body competent to elect members for the two seats in the Senate, now in question, was the Trade Union Council recognised by the Governor by Government Notices Nos. 93 and 303 of 1927: and that the election of the appellants, Messrs. Mifsud and Borg, by the constituency named only in Government Notice No. 93 was null and void. As to the claim of the appellant, Mr. Mifsud, that under Article 16 of the Regulations of the 30th September, 1926, he was entitled to remain a member of the Trade Union Council up to the 31st December, 1928, the Court of Appeal held that he had thereunder no vested right to remain an elector or an eligible candidate, as these regulations

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were merely a ministerial measure and, as such, subordinate to the absolute right of the Governor to recognise from time to time the persons who should form the Trade Union Council for the purposes of the Letters Patent. These persons, for the election in question, and as representatives of the Unione, were those named in Government Notice No. 303 of 1927.

Special leave to appeal from this judgment, as has been already stated, was granted by His Majesty in Council on the 5th November, 1928.

Now their Lordships in the above recital have refrained from referring to the many topics, both of law and of constitutional practice, which were discussed before them by learned counsel on both sides. They have referred only to those matters which seem in some sense relevant to the preliminary question to the consideration of which they now proceed, viz., whether His Majesty can be advised by them further to entertain this appeal.

The clause of the Letters Patent which deals with this matter is Art. 33, and is in the following terms:—

> "All questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by Our Court of Appeal in Malta."

To their Lordships, these words appear to be clear and distinct. They direct that all questions touching the membership either of the Senate or Legislative Assembly created by the Letters Patent themselves shall "be referred to and decided" not by the First Hall of the Civil Court, or any Court of first instance, but by the Court of Appeal of Malta, the highest judicial tribunal of the Island. Even if their Lordships had in this matter been without authority to guide them, they would have been led by the words themselves to the clear conclusion that His Majesty had advisedly designated His Court of Appeal in Malta finally to determine all these questions. It appears to their Lordships that the section being found in Letters Patent, in which His Majesty's own words are used, gains in this respect an added significance, the force of which ought to have full effect given to it.

But this view is, their Lordships find, fully confirmed by the authorities, of which *Theberge* v. *Laudry*[1] is the most notable.

In that case, which dealt, as this does, with questions relating to the membership of legislative bodies, it is pointed out that decisions upon such matters are not decisions of mere

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1. (1876) 2 A.C. 102.

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ordinary civil rights; that such an enactment as this Art. 33 creates an entirely novel jurisdiction, the history of which, in cases where the legislative assembly is not itself then created for the first time, has been that the assembly has, by its own consent, concurred in vesting in the Court the jurisdiction hitherto inherent in itself of determining the status of those who claim to be its members. The jurisdiction is extremely special: it is of a character that ought, as soon as possible, to become conclusive, in order that the constitution of the assembly may be distinctly and speedily known. There is another reason for finality in such a jurisdiction. It concerns what, according to British ideas, are normally the rights and privileges of the Assembly itself, always jealously maintained and guarded in complete independence of the Crown so far as they properly exist, and as Lord Cairns adds in delivering the judgment of the Board in *Theberge* v. *Laudry*[1]:

"It would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place. . . . their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown."

It is true that these words were spoken in a case where the special tribunal had been created with the consent of the Legislative Assembly, and not as, in this instance, where the Assembly is itself brought into existence by the Letters Patent, which also confer this jurisdiction on the Court of Appeal. But, as it appears to their Lordships, His Majesty, in these Letters Patent is merely adopting principles, to which all Lord Cairns's reasoning applies. He assumes that any enlightened legislative body would itself choose just such a tribunal as he himself prescribes for the determination of all such questions: accordingly, he creates a jurisdiction in terms of finality which leave no room for any review by himself.

And the history of this case, as their Lordships have detailed it, serves to demonstrate the convenience of the course in this instance taken. The action impugning the election here was commenced on the 5th July, 1928: the decision of the Court of Appeal was given in little more than a month—on the 14th

1. (1876) 2 A.C. 102 at 108.

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August, 1928. It is more than a year later that this appeal comes before the Board.

Their Lordships would also permit themselves this further observation. While not intimating any opinion on the merits or otherwise of the appeal—although these were fully argued before them—they cannot refrain from expressing their satisfaction that the Court of Appeal was able to uphold, in principle, an election at which the Unione would have been fully represented by delegates whose views, it seems, would have adequately reflected the then opinions of their constituents, the members of the Unione. The position of the Unione in either of the two impugned elections was very different, as their Lordships have pointed out. It cannot be too clearly understood that the first duty of the Governor in recognising any Trade Union Council is to see that it represents, so far as is possible, the views of the ultimate constituents who are represented by its members. The views, as such, of any political party in the State—whether those of the Government or of the Opposition, or of any other group, should not be allowed to enter into the question of recognition at all.

Upon the whole matter, and for the reasons given, their Lordships will humbly advise His Majesty that this appeal be not further entertained. The appellants must pay to the respondents the costs they have incurred in resisting it.

Solicitors for appellants: *Witham, Roskell, Munster & Weld.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

Ammani Ammal .. *Appellant**

v.

M. Narayanasami Naidu .. *Respondent.*

Ammani Ammal v. Narayanasami Naidu.

Practice—Letters of administration—Grant on footing of intestacy—Revocation—Application by person other than grantee—Procedure—Issue of citation in Form No. 124—Madras High Court Rules, Original Side, O. 34, Rr. 57 and 62—Objection of grantee to revocation—Dismissal—Order if

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*O.S.A. No. 87 of 1929. 4th February, 1930.

Ammani Ammal v. Narayanasami Naidu.

appealable—Grant of administration—Onus of proof—Indian Succession Act, 1925, *S.* 218 (1).

Where the Court granted letters of administration without the will annexed, and a person, other than the grantee, applied for revocation of the grant;

Held, the application should be made under R. 57 and not R. 62 of O. 34, Madras High Court Original Side Rules, and a citation should be issued in Form No. 124.

Tristram and Coote's *Probate Practice,* 16th Edition, p. 923, referred to.

Held, further, that the order of the Court finally disposing of the application of the grantee objecting to the revocation of the grant is appealable.

Semble: Where a will has to be proved the *onus probandi* is on the party propounding the will. But in the case of a Hindu dying intestate, the party whose grant of administration has been called in must satisfy the Court that a grant can be made to him under S. 218 (1) of the Indian Succession Act.

On appeal from the Orders of the Honourable Mr. Justice Eddy, dated 27th September, 1929 and 3rd October, 1929, and passed in the exercise of the Original Testamentary and Intestate Jurisdiction of the High Court in Application No. 2919 of 1929 in O.P. No. 106 of 1924, T.O.S. No. 9 of 1929.

[The facts of the case and the order of Eddy, J., against which the appeal was preferred, are set out in the judgment of Ramesam, J.]

G. Ramakrishna Aiyar and *C. Srinivasachariar* for appellant.

K. Krishnaswami Aiyangar and *P. Thiruvengadaswami Mudaliar* for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS. *Ramesam, J.*—This appeal raises an important question of procedure. The facts out of which the matter arises may be stated. One Perumal Naidu died in Madras in 1924 leaving his sister Ammani Ammal. A brother of his named Ramaswami Naidu predeceased him. One M. Narayanaswami Naidu, who is a brother of Govindammal, widow of Ramaswami Naidu, applied for letters of administration to the estate of Perumal Naidu. That application was O. P. No. 106 of 1924. Letters of administration were granted to him on the 5th February, 1925, after notice to Ammani Ammal and to Govindammal.

The present application was filed on the 17th of August, 1929, praying that the letters of administration granted to

Narayanaswami Naidu should be recalled. The grounds disclosed in the affidavit accompanying this application are that Narayanaswami Naidu in his application of 1924 claimed to be the adopted son of Ammani Ammal but as a matter of fact he was not the adopted son, that Ammani Ammal was made to appear to consent to the former order by being induced to put her mark to certain papers the contents of which she was not able to understand clearly and that, in short, her consent was procured fraudulently. This application was filed under S. 263 of the Indian Succession Act and O. 34, R. 54 of the Original Side Rules by means of a Judge's Summons and a Citation. Narayanaswami Naidu appeared on the Judge's Summons and filed an application with an affidavit on the 27th of August, 1929, and opposed the application on the merits and also contended that the application by way of Judge's Summons and Citation under R. 54 does not lie. The matter came on before our brother Krishnan Pandalai, J., on the 6th of September, and he passed an order to this effect: "Issue Citation under O. 34, R. 62. Number as a T.O.S." And on the defendant's application, he passed the following order: "The applicant has now taken out a Citation under O. 34, R. 62, and does not press this Judge's Summons. Costs to be provided for in costs in the T.O.S. in Citation." The matter again came on before our brother Eddy, J., on the 27th of September, when he passed the following order: "Leave to amend and reserve Citation. Adjourned until October 3rd." On the 3rd of October further orders were passed as follows: "Citation having been amended by consent, no order except that the applicant do have the costs of this application." It is against this last order that the present appeal is filed.

The learned advocate for the respondent takes a preliminary objection that this appeal does not lie. As the order of the learned Judge finally disposes of the application of Narayanaswami Naidu and awards costs, we think that this is a final order and an appeal lies. We overrule the preliminary objection.

The amendment ordered by Eddy, J., and made pursuant to his Order amends the Citation into a form similar to No. 99 at page 923 of the 16th Edition of Tristram and Coote's *Probate Practice*. This order was passed apparently on the ground that there is no form in the Original Side Rules expressly providing for a matter of this kind and that therefore O. 34, R. 62 applies. This brings in the practice and procedure

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Ramesam, J.

of the Probate Division of the High Court of Justice in England. That is why Form No. 99 already mentioned has been adopted. It is now contended before us that there is no need for bringing in the English practice and for relying on R. 62. Rule 54 applies to a case where a person to whom the grant of probate or letters of administration has been made desires to have the same revoked. The case where a person other than the grantee of the probate or letters of administration desires that the grant may be revoked has got to be provided for, and as I will presently show, R. 57 was intended to provide for such a case. Reading the opening words of the rule, "If, subsequent to the grant of probate or letters of administration *with the will annexed* any person interested in the property of the testator, other than the grantee," etc., one would think that R. 57 was intended to apply only to cases where probate or letters of administration *with the will annexed* has been granted and a person other than the grantee desires revocation of the grant. But continuing to read the rule we find it contains a provision that the Registrar shall issue a Citation in Form No. 123 or 124. Form No. 123 refers to a case where probate was granted and where it is desired that the grant should be revoked. Form No. 124 refers to a case where letters of administration were granted but a will had been discovered afterwards or some other reason existed why the letters of administration should not be granted and it was desired that the grant should be revoked. It does not refer to a case where letters of administration without a will were granted. Thus it appears to directly conflict with the rule referring to it. Reading R. 57 with Form No. 124 we have only two alternatives before us so far as letters of administration are concerned: (1) the rule and the form contradict each other which is meaningless, or (2) the rule was intended to apply to cases of all letters of administration either with the will annexed or without will and the form illustrates one of the cases where letters of administration were granted without any will. The latter mode of construction commends itself to us. The omission of the case of grant of mere letters of administration without a will in R. 57 seems to be a slip. Rule 54 provides for the grant of probate or letters of administration but where the grantee desires revocation of the grant. Rule 57 was obviously intended to apply to cases of grant of probate or letters of administration but where a person other than the grantee desires revocation of the grant. That this was the general object of Rule 57 is shown by Form No. 124 and we ought to construe the rule in the light thrown

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by the form. So read, we think that R. 57 of O. 34 taken with Form No. 124 applies to this case and there is no need to bring in O. 34, R. 62. We invite the attention of the Registrar to this fact so that proper steps might be taken to make the language of R. 57 clear.

The learned advocate for the respondent does not object to the citation. His anxiety seems to be that if the Citation is issued under R. 57 the burden of proof would be on him but if the Citation is issued under the English Form the burden of proof will be upon the appellant, and he wants to avoid the *onus* on himself. I do not think that the burden of proof necessarily changes with the form adopted. On this matter, I agree with the observations of my learned brother and the respondent's burden may be lightened by the conduct of the appellant in the former proceedings and other considerations, and may be even shifted and I do not propose to say anything further on this matter. At present we hold that the Citation ought to be issued under O. 34, R. 57. The Order of Eddy, J., is set aside and a Citation in Form No. 124 with the necessary changes will now issue.

Having regard to the considerable doubt resting in the matter and the way in which the rules are drafted, we do not think this is a matter in which Narayanaswami Naidu ought to have costs of the application. Costs of the parties including court-fee will abide the result of the enquiry.

Cornish, J.

Cornish, J.—I do not think that there was any need to have had recourse to R. 62, O. 34. Form No. 124, which is the form of Citation directed to be used by R. 57, specifically applies to the calling in of a grant of letters of administration, which has been made upon the footing of an intestacy. Reading the rule with the Form, therefore, it appears that the rule was intended to embrace proceedings to revoke grants of letters of administration, although in terms the rule mentions probate and letters of administration with will annexed only. There is no reason why a different procedure should be followed in the case of revoking a grant of letters of administration to that which is prescribed by the rule for the revocation of a grant of probate. In the one case the object is to compel the party who has obtained the probate to propound the will, and in the result the suit becomes one for proving the will in solemn form of law. And in the other case, the object is to compel the party who has obtained the grant of administration to establish such a degree of relationship with the deceased as will entitle him to the grant, and in the result it becomes an interest

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suit. (*See* Tristram and Coote's *Probate Practice,* 16th Edition, page 427.)

As there was some discussion by the learned counsel upon the question of *onus* of proof in the testamentary suit which follows upon the issue of a Citation under the rule, it may be pointed out that where a will has to be proved in solemn form "the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator": *Barry* v. *Butlin.*[1] But when, as here, the deceased died intestate and was a Hindu, the party whose grant of administration has been called in must satisfy the Court that a grant can be made to him under section 218 (1), Indian Succession Act, that he is, in the words of the section, "a person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the estate or any part of such deceased's estate."

B.V.V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Kanta Venkanna .. *Petitioner* (1st Counter-petitioner)*

v.

Inuganti Venkata Surya Neeladri Rao .. *Respondent (Petitioner).*

Venkanna *v.* Venkata Surya Neeladri Rao.

Criminal Procedure Code (V of 1898), S. 147—Scope of—Order in the nature of mandatory injunction—Legality.

The Magistrate has power, under S. 147 of the Criminal Procedure Code, to pass an order directing the removal of obstruction to pathways, even though such an order may be in the nature of a mandatory injunction. The Amendment Act of 1923 (XVIII of 1923) has not altered the law in this respect.

Karuppanna Goundan v. *Kandaswami Goundan,* (1914) 26 M.L.J. 233, followed.

Hari Mati Dasi v. *Hari Dasi Dasi,* (1925) 30 C.W.N. 238, not followed.

Petition under sections 435, 437 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Peddapur, dated 4th June, 1929, and made in M.P. No. 1 of 1929.

V. Ramadoss and *K. Subba Rao* for petitioner.

T. Ramachandra Rao for respondent.

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*Cr. R.C. No. 739 of 1929. (Cr. R.P. No. 669 of 1929) 13th March, 1930.

1. (1838) 2 Moo. P.C. 480.

Venkanna v. Venkata Surya Neeladri Rao.

The Court made the following

ORDER.—This is a petition by the first counter-petitioner in the Lower Court to revise an order of the Sub-Divisional Magistrate of Peddapur passed under section 147 of the Criminal Procedure Code "prohibiting the respondents from putting up any bunds across the channel in their field and from interfering with the petitioner's removing the obstructions already put up," namely, "the four small cross-bunds and that part of the bund higher up which is across the channel and no further."

Three objections are raised to this order: (1) that there was no likelihood of a breach of the peace on which such an order could be justified; (2) that the Magistrate had not found, as he ought to have done, that the petitioner was entitled to the use of the water flowing down the channel in question; and (3) that the terms of the order passed by the Magistrate are in violation of section 147 according to which an order in the nature of a mandatory injunction ought not to be passed.

As to the likelihood of a breach of the peace, the Magistrate has in my opinion given good reasons for thinking that there was such likelihood. Proceedings were started on the 27th December, 1928, by an application by the petitioner in the Magistrate's Court for action under section 144. The counter-petitioners sought to defeat that petition by the plea that the apprehended obstruction to the water-course was already completed, but the petitioner represented that such was not the case. Thereupon, on the 19th February, 1929, a preliminary order under section 147 was passed, the previous order under section 144 being vacated. In these circumstances the Magistrate was justified in thinking that the danger of a breach of the peace was not over.

As to the right of the petitioner to the flow of water down this channel, it was not necessary for the Magistrate to find that a right of easement strictly so-called was established. Section 147 says "Whether such right be claimed as an easement or otherwise". All that he had to find and which he has in fact found, is that the petitioner had been for a long time using the water flowing down this channel and had in fact used it during the last monsoon.

The last is perhaps the most important objection and arises upon the form of words, used by the Magistrate in framing the

Venkanna v. Venkata Surya Neeladri Rao.

order, which I have already set forth at the beginning of this judgment. To the first portion no objection can be taken because it merely prohibits the counter-petitioners from putting up any bunds across the channel in their field. But objection is taken that the latter half of the order, where it prohibits interference with the petitioner's removing the obstructions already put up, amounts really to an order requiring the counter-petitioners to remove the bund which they have already put up and this, it is contended, the Magistrate has no power to do. This portion of the order as it stands indicates that the Magistrate thought that the petitioner might lawfully remove any portion of the bund which was obstructing the flow of the water and that he intended to prevent the counter-petitioners from interfering with the petitioner in exercising such right of removing the obstruction. The order does not really require the counter-petitioners to do anything. All that it says is that if the petitioner removes the obstruction, the counter-petitioners are to do nothing. I think this form of order is unsuitable, if not objectionable, if for no other reason than that it is likely to produce a recurrence of breach of the peace which such orders are intended to prevent. It contemplates the petitioner going upon the counter-petitioners' land and removing the bund and it requires the counter-petitioners to let him do so without hindrance. Such a situation is easily capable of producing a breach of the peace. That portion of the order therefore requires amendment.

But I will first deal with the objection of the learned advocate for the petitioner here (counter-petitioner below) that an order in the nature of a mandatory injunction must not be passed under section 147. For this reliance was placed upon a decision of a Bench of the Calcutta High Court in *Hari Mati Dasi* v. *Hari Dasi Dasi.*[1] In that case the first party complained that the second party raised a wall on her own land blocking the windows of the house of the first party thereby shutting out light and air from the rooms of the house. The Magistrate having found that light and air was obstructed as alleged made an order upon the second party that she should demolish the new wall within a period of one month. The learned Judges said that sub-section 2 of section 147 does not give the Magistrate any power directing one of the parties to do a positive act by way of a mandatory injunction directing him to demolish the wall built by her, and they further

1. (1925) 30 C.W.N. 238.

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said that the power given under section 147 (2) is analogous to the power of a Civil Court to grant a temporary injunction. Against that decision of the Calcutta High Court there is the decision of a Bench of this Court in *Karuppanna Goundan* v. *Kandaswami Goundan*.[2] In that case a pathway had been obstructed and the Magistrate had ordered that the obstruction, which was a fence, should be removed by the party who had put it up. The point being raised that that order was incorrect on the same ground as that now urged for the petitioner here, this Court held after referring to two earlier decisions of this Court that such an argument was not maintainable. Their Lordships said that they were not prepared to follow those decisions if it was intended to decide therein that the fact that section 133 of the Criminal Procedure Code expressly provides for an order by the Magistrate directing the removal of obstruction to pathways necessarily implies that a similar order cannot be passed in proceedings taken under section 147 of the Criminal Procedure Code. This decision of a Bench of this Court is binding upon me. But it is said that that decision was given under the old Criminal Procedure Code and that section 147 as amended in 1923 makes such an order illegal though it may have been possible under the old Code. With that argument I cannot agree. Section 147 of the Code of Criminal Procedure, before it was amended in 1923, dealt, like the present section, with disputes concerning the right of use of any land or water and it enabled the Magistrate, if such right was found to exist, to make an order "permitting such a thing to be done or directing that such a thing should not be done." The corresponding provision of the section as it now stands is that if the dispute exists "regarding any alleged right of user of any land or water" the Magistrate is empowered on his being satisfied about the existence of such a right, whether it be claimed as an easement or otherwise, to "make an order prohibiting any interference with the exercise of such rights." The order under the old section was directed to the person alleging that he was entitled to the right. The order under the new section is where the right exists directed to the person who is interfering with the right. Such an order is valid so long as it merely prohibits the interference with the exercise of the rights. I do not see how from this difference any inference is to be derived as to the propriety or otherwise of what may be generally called mandatory injunctions. Indeed Form No. 24 in

2. (1914) 26 M.L.J. 233.

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Schedule V of the Criminal Procedure Code seems rather to favour the argument that what might in effect amount to a mandatory injunction is permissible. In that form, in the second paragraph, the words of the order that the Magistrate may pass are "I do order . . . shall not take (or retain) possession of the said land (or water) to the exclusion of the enjoyment of the right of use aforesaid." That form is applicable to the use of land or water and it contemplates an order against a person who has interfered with another man's use of land or water that he shall not retain possession of that land or water in violation of that user. In one sense it may be said that that is a mandatory injunction because it requires the person enjoined to give up possession to the other party. I do not see what objection can be raised to using the same form as against a person who has put up an obstruction to the flow of water to which another man is entitled, modified in the following way: "I order that . . . . shall not retain any obstruction to the flow of water along the said channel to the exclusion of the enjoyment of the right of user of . . . ." or words to that effect; or alternatively "I order that . . . . shall not retain possession of the said water to the exclusion of the enjoyment of the right of user of . . . . " Either form would amount to the same thing in effect and involve upon the person enjoined the removal of any obstruction which he had put up. I am, therefore, unable to say that the amendment of section 147 has had any effect in so far as making the decision in *Karuppanna Goundan* v. *Kandaswami Goundan*[2] inapplicable.

As, however, the form of order used by the Magistrate is not suitable, that order will be amended by omitting the words "from interfering with the petitioner's removing the obstructions already put up" and substituting therefor the words "from retaining any obstruction to the petitioner's use of the water flowing along the channel in their field." With this amendment the petition is dismissed.

S.R. *Petition dismissed.*

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2. (1914) 26 M.L.J. 233.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD THANKERTON, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

The Firm of Senaji Kapurchand and others .. *Appellants**

v.

The Firm of Pannaji Devichand .. *Respondents.*

P. C.

The Firm of Senaji Kapurchand *v.* The Firm of Pannaji Devichand.

Indian Companies Act (VII of 1913), S. 4—Unregistered firms carrying on business and consisting of more than 20 persons—Illegal partnership.

Where the total number of persons constituting four unregistered firms, carrying on business, consisted of 22 persons, such a partnership would be illegal, having regard to the provisions of S. 4, Sub-S. (2) of the Indian Companies Act, 1913.

Judgment of the High Court, Madras, affirmed.

Appeal No. 109 of 1929 by special leave against a decree of the High Court, Madras, dated the 11th August, 1926, reported in *Firm of Pannaji Devichand* v. *Kapurchand*[1], which reversed a decree of the Subordinate Judge of Bellary, dated the 1st December, 1921, and dismissed the plaintiffs' suit with costs.

The plaintiffs instituted their suit in the Subordinate Judge's Court, Bellary, on the 24th October, 1918. They were three firms, one consisting of four and two consisting each of five partners. They alleged that on the 13th October, 1918, they and the defendants, another firm consisting of eight partners, entered into a partnership agreement regarding the sale of some 2,000 bales of yarn belonging to the firm of the defendants who resided and carried on business at Gadag.

For the purpose of the present report it is only necessary to state that the plaint alleged that the partnership had become dissolved by expiry of time and the plaintiffs were entitled to claim the winding up of the joint business and call on the defendants for true and accurate accounts of the partnership and to pay the plaintiffs what was due to them. They valued their claim for the purpose of jurisdiction at Rs. 22,500 and prayed that the defendants be called upon to produce their accounts regarding the disposal of the 2,000 bales above referred to, and that after providing for payment of liabilities incurred, the surplus of the partnership business be distributed according to the shares set out in the agreement.

The defendant firm filed a written statement, in which the allegations set out in the plaint were traversed.

The Subordinate Judge, after hearing evidence, decreed the plaintiffs' claim to recover from the defendant firm Rs. 8,343-12-0,

*P.C. Appeal No. 109 of 1929. .. 18th July, 1930.

1. (1926) 51 M.L.J. 667.

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but in other respects dismissed the suit. A decree was passed accordingly.

From the said decree both the plaintiffs and the defendants appealed to the High Court.

The two appeals were heard together by Kumaraswami Sastri, Offg. C.J., and Curgenven, J., who delivered judgment on the 11th August, 1926. Their judgment is reported in *Firm of Pannaji Devichand* v. *Kapurchand*[1]. They stated that when the appeal came on for hearing it was found that the number of persons constituting the four firms which were said to have entered into the alleged partnership to deal with the goods therein set out consisted of 22 persons; that according to section 4, sub-section (2) of the Indian Companies Act, 1913, no company, association or partnership, consisting of more than 20 persons, shall be formed for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association or partnership, or individual members thereof, unless it is registered as a company under the Act or formed in pursuance of some other Act or Letters Patent. In the learned Judges' opinion, on the face of the plaint there were more than 20 persons combined to carry on the business mentioned in the plaint and share in the profits. Contentions on behalf of the plaintiffs that there was no business carried on within the meaning of section 4 of the Act, and that though each of the four firms which joined together to carry on business might consist of a number of persons, yet for the purpose of section 4 only the number of the firms and not the number of the persons should be counted, were negatived by the Court. The learned Judges were of opinion (relying on the decision reported in *Akola Gin Combination* v. *Northcote Ginning Factory*[2]) that having regard to the plaint itself the alleged partnership was illegal, having regard to section 4 of the Companies Act. They held that the suit failed and that the plaintiffs were not entitled to any decree. They, therefore, allowed the defendants' appeal and dismissed the plaintiffs' suit with costs, and dismissed the plaintiffs' appeal without costs. The other questions arising in the memoranda of appeal were not discussed.

From the said decree of the High Court the plaintiffs appealed by special leave to His Majesty in Council.

Narasimham for appellants.—The High Court was not competent to raise *suo motu* the question of the applicability of section 4, Companies Act. In any case, we submit that the partnership was not illegal. The definition of "person" in section 3, sub-section (39) of the General Clauses Act, 1897, is applicable, and the judgment relied on by the High Court, *Akola*

1. (1926) 51 M.L.J. 667. 2. (1914) 10 Nag. L.R. 98.

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Gin Combination v. *Northcote Ginning Factory*[2], does not lay down the correct law. Referred also to *Moti Ram* v. *Muhammad Abdul Jalil*[3], *Mewa Ram* v. *Ram Gopal*[4] and *Gangayya* v. *Venkataramiah.*[5]

Wallach for respondents was not called upon.

18th July, 1930. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—Their Lordships need not call upon the respondents' counsel.

They agree with the judgment of the Court below, and with the reasons given by that Court; accordingly, their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD TOMLIN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Pandit Shalig Ram and others .. *Appellants**

v.

Bawa Charanjit Lal and another .. *Respondents.*

P. C.

Pandit Shalig Ram *v.* Bawa Charanjit Lal.

Hindu Law—Will—Construction—Devise to wife—"Heir"—Absolute estate.

There is no rule of Hindu Law that in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate unless the power of alienation is conferred upon her in express terms. If words are used conferring absolute ownership upon the wife, she enjoys the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context are sufficient to show that such absolute ownership was not intended.

Bhaidas Shivdas v. *Bai Gulab,* (1921) L.R. 49 I.A. 1 at 7: I.L.R. 46 B. 153: 42 M.L.J. 385 (P.C.), followed.

Ramachandra Rao v. *Ramachandra Rao,* (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320: 43 M.L.J. 78 (P.C.) and *Mussamat Surajmani* v. *Rabi Nath Ojha,* (1907) L.R. 35 I.A. 17: I.L.R. 30 A. 84: 18 M.L.J. 7 (P.C.), referred to.

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*P.C. Appeal No. 3 of 1929. 26th June, 1930.

2. (1914) 10 Nag. L.R. 98.
3. (1924) I.L.R. 46 A. 509.
4. (1926) I.L.R. 48 A. 395.
5. (1917) I.L.R. 41 M. 454: 34 M.L.J. 271.

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Pandit Shalig Ram *v.* Bawa Charanjit Lal.

A Hindu testator by his will gave the residue of his property to his two widows and his son's widow, in the following terms: "The three persons are the heirs (*waris*) to whatever is left from the property".

Held, that on its true construction, and on consideration of all the terms of the will, the intention of the testator was to confer upon each of his two widows and his widowed daughter-in-law full proprietary rights in a one-third share of the residue of his estate, and that there was nothing in the circumstances or in the context to indicate that it was the intention of the testator to limit the estate of any of the three devisees to a life-estate or to a limited estate similar to a "widow's estate" under the law of inheritance.

Judgment of the Judicial Commissioner, N.-W.F. Province, reversed.

Appeal No. 3 of 1929 from a decree of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar, dated the 25th July, 1927, which modified a decree of the Subordinate Judge of Peshawar, dated the 1st July, 1926.

The main question for determination on the present appeal was the right of the original plaintiffs to succeed to the property of one Mul Chand on the death of his last surviving widow, Mussamat Sahib Devi, and this question turned upon the true construction of the will, dated 26th July, 1891, of the said Mul Chand. The material passages from the will are set out in their Lordships' judgment. The important clause of the will (by which the testator nominated the ladies as his *waris* or heirs), is as follows, in the vernacular:—

"Werwa Patyan hunda barabar Patyan tin rahyan."

"Mata Wadi—Chhoti—Bawa Sundar *di wohoti—Is jaedad se faltu kharch kad kar jo rah jawe tin shakhs waris hain—Jo muafi di paidawari karne* Narsingh Das Shalig Ram *riha*."

The English translation of this clause is given at page 442 beginning "As regards the details of shares."

Dunne, K.C. and *Wallach* for appellants.

De Gruyther, K.C. and *Robert Fortune* for respondents.

26th June, 1930. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by the defendants in the suit against a decree of the Judicial Commissioner of the North-West Frontier Province, dated the 25th of July, 1927, which reversed a decree of the Subordinate Judge of Peshawar, dated the 1st of July, 1926, and decreed the major portion of the plaintiffs' claim.

The suit was brought by Hukam Chand and Charanjit Lal, alleging that they were the reversionary heirs of one Mul Chand and that on the death of his last surviving widow, Musammat Sahib Devi, they were entitled to recover possession of the properties specified in the plaint, which they alleged were

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in the possession of the defendants, and which were originally the ancestral property of the said Mul Chand. Hukam Chand died *pendente lite* and is now represented by Musammat Sitan Devi, the second respondent.

The defendants claim title to the said properties by transfer either "*inter vivos*" or by will from the said Musammat Sahib Devi.

Mul Chand was a Baba or Hindu priest, who lived in Peshawar city, and the properties in suit consist chiefly of houses in Peshawar city and some revenue-free land near Peshawar, the revenue of which had been assigned by Government to a shrine known as Devi Dawara.

The Subordinate Judge who tried the case in the first instance dismissed the plaintiffs' suit with costs.

The plaintiffs appealed to the Court of the Judicial Commissioner, who allowed the appeal and remanded the suit to the Subordinate Judge for the decision of certain issues which the Subordinate Judge had left undecided.

On the further hearing on remand the Subordinate Judge made a decree in favour of the plaintiffs for possession of one-third of the properties numbered 3 and 11, and for redemption of the mortgaged property numbered 8, on payment of the mortgage money and costs and the amount spent in reconstruction of the property after a fire, namely, Rs. 5,749. The suit with respect to the remaining property was dismissed.

The plaintiffs again appealed to the Court of the Judicial Commissioner, who made a decree in their favour for possession of the properties numbered 1, 2, 3, 4, 6, 10 and 13 with *Jagir*—and for redemption of the property numbered 8 on payment of Rs. 3,695. The said sum of Rs. 3,695 was sufficient, in the opinion of the Judicial Commissioner, to cover the mortgage money, the interest thereon and the enhanced value caused by the reconstruction of the property after the fire. The remainder of the plaintiffs' claim was dismissed, and the Judicial Commissioner directed that the plaintiffs should recover costs on the properties which they had won and pay costs on those which they had lost from and to the defendants, who were in possession.

From this decree the defendants have appealed to H[is] Majesty in Council.

At the hearing of the appeal before the Board the le[arned] Counsel for the plaintiffs did not rely on the contention [of "res] *judicata*" which was raised in the Court of the Judicia[l]

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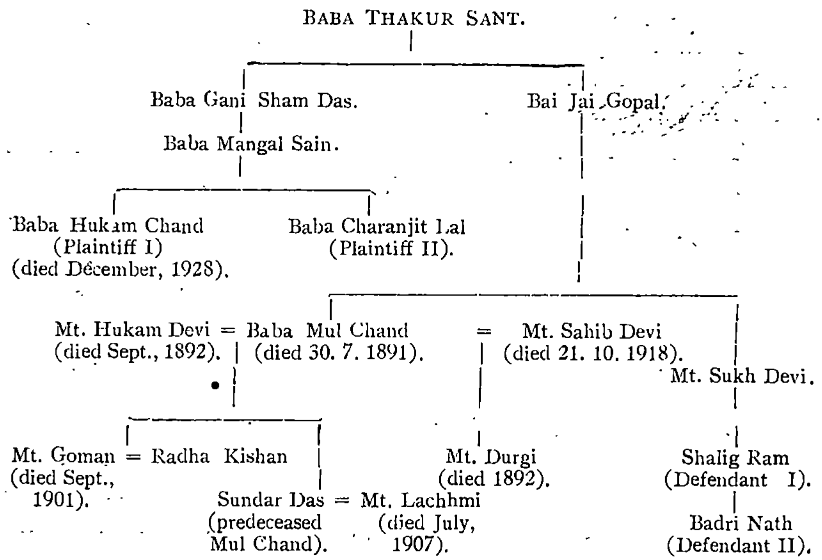
sioner. Their Lordships, for reasons which need not be set out, are of opinion that the learned Counsel was right in adopting that course.

The questions in the appeal relate to the wills of Mul Chand, and before dealing with the points relating thereto it will be convenient to set out the following pedigree, which shows the relationship existing between the parties:—



Mul Chand died on the 30th of July, 1891. There is no doubt that Mul Chand on the 19th of July, 1891, made a will, which was duly registered on the 20th of July, 1891.

It was alleged by the defendants that he made a second will on the 26th of July, 1891. This will was not registered.

It was contended on behalf of the plaintiffs that there was no proper proof of the second will, dated the 26th July, 1891, and it will be convenient to deal with this contention at once.

A document which purported to be a copy of that will was produced at the trial.

Both the Courts in India came to the conclusion that the aforesaid document represented the will of Mul Chand.

The original will was alleged to have been lost, and their Lordships are of opinion that there was evidence which would entitle the Courts in India to arrive at the above-mentioned conclusion, and they see no reason for interfering with their finding in this respect.

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This appeal, therefore, must be considered on the assumption that both the wills were duly executed by the testator, Mul Chand, and that the terms thereof are contained in the two documents on the record.

The main question relates to the construction of the will of the 26th July, 1891.

The defendants' case, stated briefly, was that Mul Chand, on the true construction of the will, conferred full proprietary rights on his three devisees, viz., his two widows, Hukam Devi and Sahib Devi, and his son's widow Lachhmi, in the shares devised to them. On the other hand, the contention of the plaintiffs was to the effect that on the true construction of the will each of the three above-mentioned ladies was given an estate for life merely and not an absolute estate.

The determination of this question depends upon the true construction of the will of the 26th July, 1891. The earlier will, viz., that of the 19th July, 1891, was relied upon for certain purposes, *e.g.*, for the purpose of showing that the testator, when so minded, knew how to confer an absolute and a limited interest in his property. For the present, however, it is not necessary to set out in detail the terms of the earlier will.

The translation of the material parts of the will of the 26th July, 1891, is as follows:—

"To-day, 12th Sawan, 1948, Sant Baba Mool Chand being in full possession of his senses, has recorded as follows:—

"I (Narinjan Das) have written down from his dictation the method of disposal of his estate, his belongings, his ornaments and his property to whomsoever it is to be given.

"Land Revenue recoverable from the Zemindars in respect of *Muafi* for the last three years (*vide* the detail given below)."

The will then sets out a detailed description of the various properties, both movable and immovable. This is followed by a paragraph relating to the testator's younger daughter Durgi and her mother Sahib, which is as follows:—

"Rs. 500 to be kept in deposit for the younger daughter. One house known as Bawa Sunderwala to be given to younger Mata Sahib Devi, who shall realize the rent thereof, as also the interest on Rs. 500. She is the owner during the lifetime of the girl. Otherwise no concern. If she lives in the house, whether at Peshawar or Lahore, she will get food expenses. She should maintain herself on presents. If she goes to her parents' house for good, she shall receive rent of the house only. Rs. 500 shall be kept (in deposit) if it is found to be surplus amount after meeting our expenses."

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The will then recites that a small house has been gifted by the elder Bawa to one Bibi Lali, and that another house occupied by Narsingh Das and Shalig Ram Chhiber has been given to them.

Details of the *muafi* are set out, and then comes the important clause, which is as follows:—

"As regards the detail of shares there shall be three equal shares. Elder Mata, younger Mata, and the wife of Sundar Bawa, the three persons are the heirs to whatever is left from the property after meeting the expenses. The produce of the *muafi* shall be realised by Narsingh Das, Shalig Ram."

The elder Mata was Hukam Devi, the younger was Sahib Devi, and the wife of Sundar Bawa was Lachhmi.

The Subordinate Judge held that Mul Chand by his will had bestowed absolute ownership in the residue of his estate on his widows and daughter-in-law Lachhmi.

The Judicial Commissioner held that under the will of the 26th July, 1891, the widows and Lachhmi took a limited interest only. Hence this appeal by the defendants.

The intention of the testator must be gathered from the terms of the will, reading it as a whole, and not much assistance is to be gathered from the numerous cases which were cited to the Board, and in which the terms of the wills under consideration differed from the terms of the will in the present appeal.

It is, however, desirable to observe that at one time it was held by some of the Courts in India that, under the Hindu Law, in the case of immovable property given or devised by a husband to his wife, the wife had no power to alienate unless the power of alienation was conferred upon her in express terms.

It has been held by decisions of this Board that that proposition was not sound, and that—

"If words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended."

See *Bhaidas Shivdas* v. *Bai Gulab*[1] See also *Ramachandra Rao* v. *Ramachandra Rao*[2], where the decision in *Mussamat Surajmani* v. *Rabi Nath Ojha*[3] is referred to and explained.

In their Lordships' opinion, the intention of the testator in this case was to confer upon each of his two widows and his

1. (1921) L.R. 49 I.A. 1 at 7: I.L.R. 46 B. 153: 42 M.L.J. 385 (P.C.).
2. (1922) L.R. 49 I.A. 129 at 135: I.L.R. 45 M. 320: 43 M.L.J. 78 (P.C.).
3. (1907) L.R. 35 I.A. 17: I.L.R. 30 A. 84: 18 M.L.J. 7 (P.C.).

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daughter-in-law Lachhmi full proprietary rights in a one-third share of the residue of the estate comprised in his will of the 26th July, 1891.

Their Lordships have arrived at this conclusion on consideration of all the terms of the will.

It is material to notice that the testator nominated as his heirs not only his two widows, but also his daughter-in-law Lachhmi; that all three were put in the same category as "heirs," and that the words used in conferring the gift are sufficient to confer full rights of ownership.

The will contained no provision for dealing with the properties after the deaths of the three devisees, and in their Lordships' opinion there is nothing in the circumstances or in the context to indicate that it was the testator's intention to limit the estate of any of the three persons to a life-estate or to a limited estate similar to a "widow's estate" under the law of inheritance.

Their Lordships therefore are unable to adopt the construction placed on the will by the learned Judicial Commissioner.

This decision is sufficient to dispose of the appeal and it is not necessary for their Lordships to deal with the further question whether there was valid necessity for some of the transfers by Sahib Devi as alleged by the defendants.

The result is that the appeal must be allowed and the decrees of the Judicial Commissioner must be set aside and the decree of the Subordinate Judge, dated the 17th October, 1922, by which the plaintiffs' suit was dismissed, must be restored.

The plaintiffs must pay the costs of the defendants in this appeal and in the Courts in India.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Kimber, Bull, Howland, Clappe & Co.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—VISCOUNT DUNEDIN, SIR JOHN WALLIS, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Mukhlal Singh and another .. *Appellants**

v.

Kishuni Singh, since deceased, and others .. *Respondents.*

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Mukhlal Singh *v.* Kishuni Singh.

Civil Procedure Code (V of 1908), S. 110—"Value of subject-matter of suit in Court of first instance"—Mesne profits subsequent to date of suit—Special leave to appeal granted ex parte*—Objection to competence of appeal raised at the hearing.*

In computing, for purposes of S. 110, Civil Procedure Code, 1908, the amount or value of the subject-matter of the suit in the Court of first instance, mesne profits accruing subsequent to the institution of the suit cannot be taken into consideration.

Gudivada Mangamma v. *(Maddi) Mahalakshmamma,* (1929) L.R. 57 I.A. 56: I.L.R. 53 M. 167: 58 M.L.J. 184 (P.C.), followed.

Where special leave to appeal is granted by the Board *ex parte,* that does not preclude the Board, when the true facts are brought before it, from going into the question of whether the appeal is competent or not, and accordingly it is open to the respondent, at the hearing, to object to the competence of the appeal.

Shah Zahid Husain v. *Mahomed Ismail,* (1930) L.R. 57 I.A. 186: 59 M.L.J. 10 (P.C.), followed.

Appeal No. 162 of 1927, by special leave, from a decree of the High Court, Patna, dated the 8th December, 1925, which reversed a decree, dated the 26th January, 1922, of the Court of the Subordinate Judge of Arrah.

A Hindu widow governed by the Mitakshara Law transferred some landed property. She purported to do so as heir of her husband, alleging that he had separated from his joint family before his death. The surviving members of the joint family (the plaintiffs-appellants) contended that the deceased never separated from them, so that by right of survivorship they were entitled to the property. The Subordinate Judge found that the alleged separation was not proved, and decided the case in favour of the plaintiffs. The High Court, on appeal, disagreed with the finding of the Trial Court, reversed its decree and dismissed the suit.

For purposes of the present report (the appeal to the Privy Council being dismissed on a preliminary objection) only the following further facts are material:—

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*P.C. Appeal No. 162 of 1927.
Patna Appeal No. 5 of 1927. 24th June, 1930.

The plaintiffs' suit for declaration of title, or, in the alternative, for possession, was instituted on the 8th October, 1920 and valued at Rs. 6,500, Court-fees being paid on that amount. No mesne profits were claimed in the plaint, but after the decision of the Trial Court (on 26th January, 1922) in their favour, decreeing the suit, and during the pendency of the defendant's appeal to the High Court, Patna, against the said decree, the plaintiffs instituted a suit claiming Rs. 3,890 as mesne profits for the period they were, as they alleged, wrongfully kept out of possession, viz., from the 9th December, 1920 to 22nd May, 1922. While the suit for mesne profits was pending, the High Court, on the 8th December, 1925, allowed the defendant's appeal and dismissed the main suit, and as a consequence the suit for mesne profits was likewise dismissed.

The plaintiffs then applied to the High Court for leave to appeal to His Majesty in Council against the decree, dated the 8th December, 1925, dismissing their main suit, and they contended that the amount or value of the subject-matter of the suit in the Court of first instance was Rs. 10,390, *i.e.*, Rs. 6,500, value of the property in dispute, *plus* Rs. 3,890, mesne profits. The High Court having rejected the petition on the ground that the value of the subject-matter was only Rs. 6,500, the plaintiffs obtained special leave to appeal from His Majesty in Council.

Dunne, K.C. and *Hyam* for appellants.

Wallach for respondents.

At the hearing of the appeal, Wallach for respondents objected that the appeal did not lie, the provisions of section 110, Civil Procedure Code, 1908, not having been fulfilled. The sum of Rs. 10,000 was exceeded only if the mesne profits from the date of the institution of the suit were added. It has now been authoritatively decided that they cannot be so added; *Gudi-*
authoritatively decided that they cannot be so added: *Gudi-Aiyar* v. *Sellammal*[2].

The objection to the competence of the appeal can be raised at the hearing, and it is not necessary for the respondents to apply by petition that the order in Council giving the special leave should be rescinded: *Zahid Husain* v. *Mahomed Ismail*[3] and *Lord Strickland* v. *Grima*[4] *per* Lord Blanesburgh.

Dunne, K.C., replied, conceding that the decision of the Board in *Gudivada Mangamma* v. *Mahalakshmamma*[1] was against him.

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1. (1929) L.R. 57 I.A. 56: I.L.R. 53 M. 167: 58 M.L.J. 184 (P.C.).
2. (1915) I.L.R. 39 M. 843: 30 M.L.J. 317.
3. (1930) L.R. 57 I.A. 186: 59 M.L.J. 10 (P.C.).
4. (1930) A.C. 285 at 288; 59 M.L.J. 416 (P.C.).

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Mukhlal Singh v. Kishuni Singh.

Viscount Dunedin.

24th June, 1930. Their Lordships' judgment was delivered by

VISCOUNT DUNEDIN.—In this case the question has been raised as to whether the appeal is competent. Special leave to appeal was granted on an *ex parte* application; but it has been settled in a judgment of this Board that that does not preclude the Board, when the true facts are brought before it, from going into the question of whether the appeal is competent or not. (*Shah Zahid Husain* v. *Mahomed Ismail*[3].) Upon that question the present case seems to be entirely covered by another decision of the Board in *Gudivada Mangamma* v. *Maddi Mahalakshmamma*.[1] Under these circumstances their Lordships will humbly advise His Majesty that the appeal is incompetent and should be dismissed with costs.

Solicitors for appellants: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—VISCOUNT DUNEDIN, SIR JOHN WALLIS, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Jagmohan Singh and another .. *Appellants**

v.

Pandit Sri Nath and others .. *Respondents.*

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Jagmohan Singh v. Pandit Sri Nath.

Hindu Law—Gift of immoveable property by husband to wife—Words conferring absolute ownership upon wife—Donee's power of alienation—"From generation to generation."

In the case of a gift of immoveable property by a Hindu husband to his wife, although the donor does not confer upon the donee express power of alienation, such power may nevertheless be deduced from the terms of the gift if the words used are sufficient to confer upon her absolute ownership, unless the circumstances or the context show that such absolute ownership was not intended. No particular words are necessary for this purpose, and if, reading the document as a whole, the conclusion is inevitable that it confers the estate out and out with no reservation, the right of alienation will be included just as much as any of the other incidents of ownership, and just as much where the gift is to a female as where it is to a male.

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*P.C. Appeal No. 124 of 1928. 22nd July, 1930.
Oudh Appeal No. 13 of 1928.

1. (1929) L.R. 57 I.A. 56: I.L.R. 53 M. 167: 58 M.L.J. 184 (P.C.).
3. (1930) L.R. 57 I.A. 186: 59 M.L.J. 10 (P.C.).

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Pandit Shalig Ram v. *Bawa Charanjit Lal*, (1930) 59 M.L.J. 437 (P.C.) and *Bhaidas Shivdas* v. *Bai Gulab*, (1921) L.R. 49 I.A. 1: I.L.R. 46 B. 153: 42 M.L.J. 385 (P.C.), followed.

Mt. Surajmani v. *Rabi Nath Ojha*, (1907) L.R. 35 I.A. 17: I.L.R. 30 A. 84: 18 M.L.J. 7 (P.C.) and *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*, (1921) L.R. 49 I.A. 25: I.L.R. 1 Pat. 305: 42 M.L.J. 492 (P.C.), referred to.

Ramachandra Rao v. *Ramachandra Rao*, (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320: 43 M.L.J. 78 (P.C.), distinguished.

Held, on the construction of the particular deed of gift in suit, that it conferred upon the wife an absolute estate in the property, and she had, therefore, the power to alienate it.

The words "from generation to generation" (*naslan bad naslan*), in a deed of gift, have now acquired almost a technical meaning, and ordinarily convey an heritable and alienable estate.

Ram Lal Mookerjee v. *Secretary of State for India*, (1881) L.R. 8 I.A. 46: I.L.R. 7 C. 304 (P.C.) and *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*, (1897) L.R. 24 I.A. 76; I.L.R. 24 C. 834 (P.C.), relied upon.

Appeal No. 124 of 1928, from a decree, dated the 13th December, 1927, of the Chief Court of Oudh confirming a decree, dated the 29th January, 1926, of the Subordinate Judge, Fyzabad.

The main question for determination on the present appeal was whether by a deed of gift, dated the 7th May, 1877, executed by Subedar Gaind Singh in favour of his wife, Agind Kuar, full proprietary rights were conferred upon her.

The terms of the deed of gift are set out in their Lordships' judgment.

De Gruyther, K.C. and *L.M. Jopling* for appellants.

Dunne, K.C., Dube and *A. P. Sen* for respondents.

De Gruyther, K.C. for appellant.—We submit that the grantee obtained in the property gifted an interest for life with remainder to her heirs. In order to confer upon her the power of alienation, it was necessary to use express words or words of at least sufficient amplitude: *Ramachandra Rao* v. *Ramachandra Rao*.[1]

The decisions of the Board in *Surajmani* v. *Rabi Nath Ojha*,[2] *Fateh Chand* v. *Rup Chand*[3], *Bhaidas Shivdas* v. *Bhai Gulab*[4] and *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*[5] are distinguishable; there, the words used were "malik", "malik with full proprietary powers," etc.

1. (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320: 43 M.L.J. 78 (P.C.).
2. (1907) L.R. 35 I.A. 17: I.L.R. 30 A. 84: 18 M.L.J. 7 (P.C.).
3. (1916) L.R. 43 I.A. 183: I.L.R. 38 A. 446 (P.C.).
4. (1921) L.R. 49 I.A. 1: I.L.R. 46 B. 153: 42 M.L.J. 385 (P.C.).
5. (1921) L.R. 49 I.A. 25: I.L.R. 1 Pat. 305: 42 M.L.J. 492 (P.C.).

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Mayne's Hindu Law, 7th ed., para. 397 referred to.

Counsel for the respondents were not called upon.

22nd July, 1930. Their Lordships' judgment was delivered by

SIR GEORGE LOWNDES.—In this appeal the Board have again to consider a question which has been discussed under different guises in a number of cases within the last few years, viz., whether, under Hindu Law, a woman taking immovable property by gift from her husband has power to alienate it.

The most recent decision on the subject is in *Pandit Shalig Ram* v. *Bawa Charanjit Lal*[1] which cited and followed the judgment of Lord Buckmaster in *Bhaidas Shivdas* v. *Bai Gulab.*[2] Reference was also made to *Ramachandra Rao* v. *Ramachandra Rao*[3] in which Lord Buckmaster made certain remarks explanatory of the decision in *Surajmani* v. *Rabi Nath Ojha*[4], another case in which a widow's power of alienation had been called in question, but their Lordships have no doubt that these remarks were not intended to qualify in any way the pronouncement in *Bhaidas Shivdas* v. *Bai Gulab.*[2] There is also an exhaustive judgment of Sir John Edge in *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*[5] to which Lord Buckmaster was a party and which was heard a few days only after *Bhaidas Shivdas'* case.

Under these circumstances their Lordships feel that the doctrine upon which the decision of the present appeal depends is so well established that no further discussion of the authorities is required.

If, as in the present case, the donor does not confer upon the lady express power of alienation, such power may nevertheless be deduced from the terms of the gift if the words used are sufficient to confer upon her absolute ownership, unless the circumstances or the context show that such absolute ownership was not intended. There is, their Lordships think, no magic in the use of any particular word or form of words; the document must be construed as a whole, and its fair import deduced in the ordinary way, and if the conclusion come to is that it confers the estate out and out with no reservation, the right of alienation will be included just as much as any of the

1. (1930) 59 M.L.J. 437 (P.C.).
2. (1921) L.R. 49 I.A. 1: I.L.R. 46 B. 153: 42 M.L.J. 385 (P.C.).
3. (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320: 43 M.L.J. 78 (P.C.).
4. (1907) L.R. 35 I.A. 17: I.L.R. 30 A. 84: 18 M.L.J. 7 (P.C.).
5. (1921) L.R. 49 I.A. 25: I.L.R. 1 Pat. 305: 42 M.L.J. 492 (P.C.).

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other incidents of ownership, and just as much where the gift is to a female as where it is to a male.

In the present case, one Gaind Singh executed a deed of gift, dated the 7th May, 1877, in favour of his wife Musammat Agind Kuar. The subject-matter of the gift was part of an estate in Oudh known as Bhiti Risalpur, of which Gaind Singh was the proprietor. He had no son and had already made over other considerable portions of his estate to his two daughters. After her husband's death, Musammat Agind Kuar by a sale-deed of the 8th September, 1881, transferred a portion of the property to one Chedi Ram Misr, whose interest is now represented by the respondents. The sole question raised for determination by their Lordships is whether she had power so to do. The appellants claim as the ultimate reversioners to whom the property would pass if the alienation was invalid.

The deed of gift is in the following terms:—

I am Gaind Singh, son of Nokhe Singh, caste Chhattri Bais, resident of Mauza Mareman, pargana Pachhamrath, and Seerdar and Taluqdar of Bhatti, pargana Tanda, district Fyzabad.

Whereas the entire village Fatehpur and half of village Nau Sanda constitute my Zamindari Haqiat without any co-parcenership which are in my exclusive possession, having been granted by the Government as reward for my loyalty, and I am in proprietary possession and enjoyment thereof up to the time of the execution of this deed; whereas I am now old and no reliance can be placed on this borrowed life; whereas I am afraid that this estate might be destroyed after me as I have no male issue and whereas Musammat Agind Kuar is my lawfully wedded wife besides whom I have no other co-sharer and co-parcener, so, with a view to safeguard the aforesaid property, I, while in the enjoyment of sound health and unimpaired intellect, without reluctance and coercion, have specifically gifted the Zamindari in the aforesaid villages with all the original and accreted rights, cultivated and uncultivated lands, Seer, Saer, *jalkar, bankar* and all the rights held by me, to my wife Musammat Agind Kuar, and I do hereby covenant and reduce to writing that the said lady shall, generation after generation*, remain in possession and enjoyment of Zamindari Haqiat in the said villages on payment of the Government revenue. Now, after the execution hereof, if I or any one of my heirs and co-sharers lays any sort of claim to the aforesaid property against the donee, the same shall be deemed false and untenable by the powers that be. With the exception of the lady-donee, no one else shall have any power of interference and meddling with regard to the gifted property.

Wherefore these few presents have been reduced to writing by way of a specific deed of gift, so that it may serve as an authority and be of use when required.

Their Lordships have no doubt that reading this deed as a whole it must be construed as conferring upon Musammat Agind Kuar an absolute estate in the property. Both the Courts in India by whom the case was heard came to the same conclu-

*In the original deed, the words in the vernacular for "generation after generation" are *naslan bad naslan*.—K.J.R.

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sion, and their Lordships think it unnecessary, therefore, to discuss the document in detail. They would, however, remark that not only does the donor transfer to her all his rights in the property, but he says that she is to remain in possession and enjoyment of it "from generation to generation," words which have come to have almost a technical meaning in many parts of India as conveying a heritable and alienable estate: *Ram Lal Mookerjee* v. *Secretary of State for India*[6] and *Lalit Mohun Singh Roy* v. *Chukkan Lal Roy*[7].

In their Lordships' opinion the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Watkins & Hunter.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of King's Bench for the Province of Quebec (Appeal Side).]

PRESENT:—VISCOUNT DUNEDIN, LORD DARLING, LORD WARRINGTON OF CLYFFE, MR. JUSTICE DUFF AND SIR LANCELOT SANDERSON.

Eugene Berthiaume .. *Appellant**

v.

Dame Anne-Marie Yvonne Dastous .. *Respondent.*

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Berthiaume *v.* Dastous.

Marriage—Validity—Law governing—Law of place where it is effected—Law of place of parties' domicil—Putative marriage—Marriage which is null if can be a—Civil rights attaching to—Alimony—Wife's right to—Statute—Interpretation of—Result of—Consideration of—Propriety.

If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—*locus regit actum.* If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicil

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*P.C. Appeal No. 127 of 1928. 16th July, 1929.

6. (1881) L.R. 8 I.A. 46 at 61: I.L.R. 7 C. 304 (P.C.).

7. (1897) L.R. 24 I.A. 76 at 88: I.L.R. 24 C. 834 (P.C.).

would be considered a good marriage. Of course, these results may be altered by positive, *i.e.*, statute law.

Under the law of France, there must be a civil ceremony of marriage, and if that has not taken place any religious ceremony is an idle performance so far as that law is concerned.

The doctrine of putative marriage was well known to the canon law, and has been adopted by many systems which have founded their law on the canon law. The proposition that a putative marriage cannot be a marriage which is null is not correct. It is just when a marriage is declared null that the doctrine of putative marriage becomes necessary.

All civil rights appendant to real marriage are not produced by a putative marriage. But the criterion is obvious, those only subsist which are consistent with a real marriage not existing. Alimony is such a right. The duty of a husband to support his wife is quite apart from his duty to cohabit with her. The continuance of alimony to the wife is one of the civil effects of a marriage held null but allowed to be putative.

Where the construction of a statute is in question the results of construction must be looked at.

Appeal No. 127 of 1928 from the judgment of the Court of King's Bench for the Province of Quebec (Appeal Side.)

E. Lafleur, K.C., Geoffrey Lawrence, K.C. and *Leon Faribault* for appellant.

Aine Geoffrion, K.C. and *O. W. Pritt, K.C.* for respondent.

16th July, 1929. Their Lordships' judgment was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—In 1913 the respondent, a French Canadian of the Roman Catholic faith, being then a girl 19 years of age who had just graduated from a convent in a small town in Montreal, went on a trip to Europe with her father. She there met the appellant, a member of a Quebec family and also of the Roman Catholic faith, who had been living in Paris for several years.He proposed marriage to her, and she accepted. The appellant asked the respondent to make the necessary arrangements, and she called on the cure of the parish where her fiance had been residing and where she was then temporarily residing. The cure informed her that there were certain civil formalities to be gone through and that he would celebrate the marriage. She asked her fiance to attend to the civil formalities and he took her to the British Consulate where certain papers were signed and a certificate issued which was given to her fiance. After that the parties proceeded to the church, the certificate was handed to the cure who then proceeded to celebrate the marriage according to the form of the Roman Catholic church. The parties lived together as husband and wife until the year 1926, when on returning from an absence from home the respondent discovered that the appellant had been guilty of

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infidelity and had introduced a mistress into their home. The respondent then applied to the Court in Paris for a divorce. That Court before proceeding further demanded the exhibition of a civil certificate of marriage. This the respondent was unable to produce. She discovered that the certificate which her fiance had procured at the British Consulate was only a notice of intended marriage, and that the officiating cure had carelessly omitted to notice that it was not a certificate of marriage. As a matter of fact he had exposed himself to severe penalty by celebrating the religious ceremony without the production of a certificate. As no certificate of marriage could be produced—none such ever having been in existence—the Court declined to proceed with the case for divorce. The respondent then raised another action in the French Courts, craving a judgment "pour faire statuer le mariage," and craving alternatively that if the marriage was declared void it should be held that she had contracted it in good faith and was entitled to a declaration of civil effects in her favour. The appellant appeared and denied the jurisdiction, he having still retained his Canadian domicil. This plea was sustained and the action dismissed. The respondent then raised the present action in the Superior Court of the Montreal district. The action sought a declaration of marriage, decree of separation, a dissolution of the *communaute des biens* —the marriage having been without a marriage contract, *communaute des biens* would ensue—and a judgment for alimony. Damages were also claimed but that claim was departed from. Alternatively a declaration was sought that as the respondent had been in good faith, the marriage was a putative marriage and in terms of Art. 164 of the Civil Code produced civil effects. The case depended before Loranger, J., who held the marriage valid, pronounced a decree of separation, dissolved the community of goods and granted a decree against the appellant for an alimentary allowance of $1,500 a month. On appeal the Court of King's Bench by a majority upheld the judgment. Bernier, J., dissented and held that the marriage was null and that a null marriage could not be a putative marriage. The present appeal is from that judgment.

Their Lordships are unable to agree with the judgment under appeal. If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—*locus regit actum*. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according

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to the law of the place would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicil would be considered a good marriage. These propositions are too well fixed to need much quotation. They were laid down long ago in England in the well-known case of *Dalrymple* v. *Dalrymple*[1] and in *Scrimshire* v. *Scrimshire*[2] approved by Lord Stowell in *Ruding* v. *Smith*.[3] A question precisely the same as the present had been decided in Scotland in the case of *Johnstone* v. *Godet*[4] mentioned by Lord Fraser in his work on Husband and Wife, Vol. II, p. 1310, where the parties had undergone a ceremony of marriage in Martinique, where the Code Napoleon prevailed. This marriage, if it had taken place in Scotland, would have been good. But there was no civil ceremony and the marriage was bad under the Code; and it was held no marriage in Scotland.

Of course, these results may be altered by positive, *i.e.*, statute law. A good illustration may be given in the legislation which was passed in order to cure what was thought to be abuse of Gretna Green marriages. Marriage in Scotland can be constituted by mere words of *consent de presenti* in the presence of witnesses, and English couples used to cross the border by Gretna to be married by interchange of consent in the presence of the blacksmith and his assistant. A statute was passed declaring a marriage constituted by *consent de presenti* null where the parties had not previously resided in Scotland for at least three weeks.

Now in face of the facts set forth in the narrative above given, and these facts were found by all the Judges of the Courts below and are amply borne out by the evidence, it is clear that under international law there was no marriage in this case. The law of France is peremptory. There must be a civil ceremony of marriage and if that has not taken place any religious ceremony is an idle performance so far as the law is concerned. Learned counsel for the respondent could not controvert this statement of international law, and, therefore, he sought to show that the validity of the marriage was established

1. (1811) 2 Hag. Con. 54.
2. (1752) 2 Hag. Con. 395.
3. (1821) 2 Hag. Con. 371 at 393.
4. (1813) Ferg. Con. Law Rep. 8.

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upon positive law contained in the Civil Code of Quebec. The articles he relied on were the following:—

"7. Acts and deeds, made and passed out of Lower Canada, are valid, if made according to the forms required by the law of the country where they were passed or made.

* * * * *

"51. On proof that, in any parish or religious community no registers have been kept, or that they are lost, the births, marriages and deaths may be proved either by family registers and papers, or other writings, or by witnesses.

* * * * *

"128. Marriage must be solemnised openly, by a competent officer recognised by law.

"129. All priests, rectors, ministers and other officers authorised by law to keep registers of acts of civil status, are competent to solemnise marriage. . . . .

* * * * *

"135. A marriage solemnised out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid, if solemnised according to the formalities of the place where it is performed, provided that the parties did not go there with the intention of evading the law.

* * * * *

"156. Every marriage which has not been contracted openly, nor solemnised before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the Court to decide according to the circumstances.

* * * * *

"159. No one can claim the title of husband or wife and the civil effects of marriage, unless he produces a certificate of the marriage, as inscribed in the registers of civil status, except in the cases provided for by Article 51.

"160. Possession of the status does not dispense those who pretend to be husband and wife, from producing the certificate of their marriage.

"161. When the parties are in possession of the status and the certificate of their marriage is produced, they cannot demand the nullity of such act."

The last seven Articles appear in Chapter II of the Code, the heading of which is "Of the formalities relating to the solemnising of marriages.'' It is out of the question to suppose that the legislature is dealing with anything except the formalities to be observed in the Province of Quebec. It would be idle to provide formalities to be observed in all the parts of the world. This is clear enough from the heading, but it is made more clear by the phraseology implied in the articles. Take for instance Art. 129. Who can "keep registers of acts of civil status" except the persons that can be so authorised in the Province of Quebec? The term is inapplicable to anyone else-

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where. Art. 130 with its reference to the early articles as to the publication of bans is also utterly inappropriate to a marriage except in the Province of Quebec.

The article, however, on which the respondent laid greater stress and on which the judgment of the Court below mainly proceeded is Art. 156. This is in a fasciculus of articles headed "Of actions for annulling marriage." It is not in such a division that one would expect the power of dealing with the constitution of marriage said to be contracted abroad. The Article runs:—

"Every marriage which has not been contracted openly, nor solemnised before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the Court to decide according to the circumstances."

The first sentence gives the right of challenge and doubtless every foreign marriage could come within its words for no foreign marriage could have been solemnised by a competent officer, which obviously refers to such a person in Quebec. The words which are appealed to are the last words, and it is supposed to add to their weight the fact that in the Code Napoleon on which the Quebec Code is obviously modelled the first sentence appears, but the words at the end do not. Let it be observed what the argument comes to. International law being as set forth, it is to be held that this saving clause gives a power to the Court to override that law as upheld in every other country of the civilised world, but it also if so interpreted would do more. It would enable the Court to declare marriage to arise from a proceeding which under the law of no country was ever supposed to be marriage. Naturally the good sense of the Quebec Judges would prevent them from doing any such thing; but when construction is in question the results of construction must be looked at. The truth is, that their Lordships can only look on this as a most preposterous suggestion and they agree with the view that Bernier, J., took on this matter.

The case of a foreign marriage is dealt with in terms by Art. 135, and that expresses the doctrine of international law. As this is in the section dealing with the constitution of marriage, it would have been quite out of place to express the converse of the doctrine, so that the brocard *expressio unius est exclussio alterius* cannot apply. Their Lordships have, therefore, no hesitation in declaring that the so-called marriage in this case was *ab initio* null.

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There remains, however, the question arising in sections 163 and 164. They are:

"163. A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children, if contracted in good faith.

"164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage."

Now as regards good faith, all the Judges held, and their Lordships agree with them, that there was perfect good faith on the respondent's part. She was a very young girl, quite ignorant of law, and from her antecedents and religion probably quite incapable of considering marriage as anything but a religious ceremony and ordinance. It is true that she was told that some civil formalities were necessary, but she had no exact knowledge of what that meant, and she would be amply satisfied with the assurance that they had been gone through at the British Consulate, all the more that the certificate produced was accepted as good by the officiating priest. Art. 163 is only necessary for grammatical reasons; the real article touching this case is Art. 164. It applies to this case in terms and deals with civil rights. Holding the views they did as to there being a real marriage, the majority of the learned Judges found it unnecessary to deal with Art. 164, a case of what is generally known as putative marriage. The doctrine of putative marriage was well known to the canon law, and has been adopted by many systems which have founded their law on the canon law. In England the canon law on this subject has been abandoned. In Scotland it is *in viridi observantia.* Scotland so far deserted canon law at the Reformation as to make divorce *a vinculo* competent, but otherwise its matrimonial system is founded on the canon law. Bernier, J., who disagreed with the other learned Judges as to the question of marriage, dismisses this point with the curt observation that a putative marriage cannot be a marriage which is null. This is indeed an extraordinary proposition. It is just when a marriage is declared null that the doctrine of putative marriage becomes necessary. Cases of the insistence of the so-called wife on her rights are more rare, but cases of the assertion of legitimacy of children born of a marriage subsequently declared null are numerous in every system which accepts the doctrine of putative marriage.

Two arguments were then put forward by the learned counsel for the appellant directed as to the lady's right to

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alimony. First, he said that the civil rights referred to were only those which existed up to the date when the marriage was declared null. The simple answer is that the word is "produces," not "has produced," and the absurdity of such a doctrine when applied to the legitimacy of children, who in the article are linked with the wife, is manifest. Secondly, he said that obviously all the civil rights of a wife which flow from marriage could not continue to exist, *e.g.*, the right to cohabit, and therefore the right of alimony could not exist. It is, however, impossible to suggest on this view that any civil right still exists. It is quite true, as said, that all civil rights appendant to real marriage are not produced by a putative marriage. But the criterion is obvious, those only subsist which are consistent with a real marriage not existing. Alimony is such a right. The duty of a husband to support his wife is quite apart from his duty to cohabit with her. This is correctly shown in the form of a decree of separation which deals with the mensa as separate from the torus.

Their Lordships are therefore of the opinion that the respondent is entitled to alimony. The argument of learned Counsel turned so specially on the question of alimony, that scant mention was made as to the *communaute de biens*. Their Lordships would have felt inclined to hold that inasmuch as nullity of marriage was declared, it was equivalent to saying that no *communaute de biens* ever really existed; to declare the dissolution of what never existed would be a pleonastic proceeding. But the learned Judges of the Court below who decided that the marriage was valid have had no opportunity of saying what are exactly the civil rights of a putative marriage, and since the case was first heard their Lordships have had their attention directed to several cases which seemed to point to a settled practice as to this, which their Lordships in such a matter would not willingly disturb. They are, therefore, of opinion that the case should be remitted to the Superior Court of Quebec to deal with the civil effects of a marriage held null but allowed to be putative: it being distinctly understood that their Lordships are clearly of opinion that the continuance of alimony to the wife is one of the civil effects, the amount of which it will be for the Court of Quebec to determine, the amount decreed for in the judgments recalled being continued in the meantime.

The costs of the appeal will be borne as between solicitor and client by the appellant, who will also fulfil the other articles of the conditions on which special leave to appeal was granted.

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Their Lordships will humbly advise His Majesty that the appeal should be allowed and the case remitted to the Superior Court accordingly.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent: *Lawrence Jones & Co.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

Konda Reddi and others .. *Petitioners**

v.

Mangala Babanna .. *Respondent.*

Konda Reddi *v.* Mangala Babanna.

Criminal Procedure Code (*V of* 1898), *S.* 428—*Appellate Court framing different charges—Conviction—Procedure—Propriety of.*

The appellants were tried by a Magistrate for offences under Ss. 347 and 384 of the Indian Penal Code and convicted. On appeal to the Sessions Judge he found the evidence for the conviction was not sufficient and framed fresh charges under S. 423 of the Indian Penal Code, after going through additional evidence which was directed by him to be let in by the Trial Court. He convicted the accused under the fresh charge and ordered them to pay fine, in default of which they were to undergo imprisonment. On the question whether the procedure adopted by the Sessions Judge was proper,

Held, that it did not enable an appellate Court to adopt the procedure adopted in this case by the learned Sessions Judge.

S. 428 of the Criminal Procedure Code merely enables an appellate Court, if it thinks it necessary, to call for additional evidence which will explain or clear up or perhaps supplement within limitations the evidence for the prosecution in support of a charge which has resulted in a conviction and which conviction is the subject of an appeal.

The Sessions Judge might have indicated that a charge under S. 423 might be framed and sent the case back for retrial.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Anantapur, in Criminal Appeal No. 5 of 1929, preferred against the judgment of the Court of the Joint Magistrate of Penukonda in Calendar Case No. 75 of 1927.

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*Cr. R.Cs. Nos. 968 and 969 of 1929. 14th July, 1930.
Cr.R.Ps. Nos. 872 and 873 of 1929.

K. V. Sesha Aiyangar, T. Jagannadha Rao Naidu, K. S. Jayarama Aiyar for *Nugent Grant* and *D. R. Venkatesa Aiyar* for petitioners.

K. Venkataraghavachariar for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

Beasley, C. J.

ORDER. *Chief Justice.*—Four persons including the appellants in Criminal Revision Case No. 968 of 1929 (Accused 2 and 3) and the appellant in Criminal Revision Case No. 969 of 1929 (Accused 5) were convicted by the Joint Magistrate of Penukonda for offences under sections 347 and 384, Indian Penal Code, for wrongful confinement to extort property and extortion.

The facts can be dealt with quite shortly and they are that on the 3rd December, 1927, a document was registered by the District Registrar at Anantapur, the material portions of which ran as follows:—

"Deed of sale caused to be written and given to Nethi Narayanappa of Pandurthi. To discharge debts due to others for the purchase of mango trees, I have received from you in cash this day Rs. 300. The land sold to you for this sum is S. No. 882, extent 0·71 acres with the various fruit trees standing therein. I have put you in possession this day. Henceforward you will have all my rights. My heirs and I will have nothing to do with it."

Then there is the mark of Mangala Babanna who admittedly was an illiterate person and the two witnesses are accused 2 and 3. Upon this document were founded the two charges against the accused, the prosecution case being that Mangala Babanna was by confinement and extortionate methods made to execute that document, that he as a matter of fact was not the owner of the property at all and that it was a spurious document got for the purpose of defrauding others. In support of the prosecution case some evidence was given to show that whereas in the body of the document Rs. 300 was stated to have been paid by way of consideration, none in fact was paid. Though the question of consideration was quite an irrelevant one to the two charges then before the Court, because both the charges could be supported equally well, whether there had been consideration passing or not, the Joint Magistrate considered it as of some importance as supporting the case for the prosecution and dealt with it. This resulted, as before stated, in the conviction of four of the accused, three of whom are the appellants here. The case then came up before the learned Sessions Judge of Anantapur and he, after going very carefully into the facts in a very

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lengthy and elaborate judgment, came to the conclusion, to put it quite shortly, that the evidence certainly did not support the conviction of the accused of either offence. He then resorted to a procedure which is called in question here. Having come to the conclusion that no conviction under sections 347 and 384, Indian Penal Code, could be supported upon the evidence, he dealt with the evidence given with regard to the consideration which passed for the document and decided for reasons which he has given in his judgment that a charge could be framed under section 423, Indian Penal Code, and that in order that such a charge might be framed there should be additional evidence before him; and he accordingly made an order that the Joint Magistrate should take evidence on the question as to whether or not the Rs. 300 consideration or any part of it passed on the date or at about the time of the execution of that document. The result of that enquiry was that he proceeded upon the additional evidence which came before him and found that no consideration for the sale did pass. He thereupon framed charges against the appellants under section 423, Indian Penal Code, acquitting the other accused who remained before him; and having framed those charges, he proceeded at once, for the reasons which he has given in the earlier part of his judgment, to convict the appellants and ordered them to pay fines amounting in the case of the 3rd accused to Rs. 500 and in the case of the 2nd and the 5th accused to Rs. 1,000 each, in default of which there was to be a term of imprisonment.

The matter reduces itself to this, was the procedure adopted by the learned Sessions Judge a proper one or not? It is, of course, conceded that under section 428 of the Code of Criminal Procedure an appellate Court in dealing with an appeal under the chapter in which the section appears may, if it thinks it necessary, order additional evidence to be recorded after stating its reasons for so doing and either may take the evidence itself or direct it to be taken by a Magistrate and it was purporting to act under this section that the additional evidence was ordered to be taken by the learned Sessions Judge. The strong criticism that is made here by Mr. Jayarama Aiyar is that the accused had been convicted under sections 347 and 384, Indian Penal Code, and had appealed to the Sessions Court of Anantapur against their conviction for those offences and none other and that there was no appeal against any conviction under section 423, Indian Penal Code, because there had not been any conviction or any trial even for an offence under that section. He contends that section 428, Criminal Procedure Code,

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merely deals with an appeal against a conviction and does not enable the appellate Court to substitute an offence in respect of which there has not been a conviction and then say that additional evidence must be called which may support such an offence. We think that that criticism is clearly correct and well founded and that section 428, Criminal Procedure Code, merely enables an appellate Court, if it thinks it necessary, to call for additional evidence which will explain or clear up or perhaps supplement within limitations the evidence for the prosecution in support of a charge which has resulted in a conviction and which conviction is the subject of an appeal and that it does not enable an appellate Court to adopt the procedure adopted in this case by the learned Sessions Judge. He might—although we say nothing about its being proper in this case, it is merely an indication of a possible procedure—have indicated that a charge under section 423, Indian Penal Code, might be framed and sent the case back again for retrial. But in this case he did not adopt that procedure and we are of the opinion that this petition must be allowed. The convictions will be set aside and the fines paid will be refunded to the appellants.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Swarna Kotayya .. *Appellant* (Plaintiff)*

v.

Karamacheti Vardhanamma and others .. *Respondents (Defendants).*

Swarna Kotayya v. Vardhanamma.

Hindu Law—Will—Construction of—Bequest to daughter—Nature of estate—"Have been transferred" if sufficient to convey absolute estate—Will or gift—Test of distinction—Indian Evidence Act (I of 1872), S. 90—Presumption of disposing power of testator if permissible.

The words "duly attested" in S. 90 of the Evidence Act justify not merely the presumption of execution and attestation but also a presumption in favour of the disposing power of the testator.

The general rule in cases of gifts to a Hindu female is that she gets the estate which the Hindu Law confers upon her unless there are words to restrict or amplify it. Where under the Hindu Law, the estate conveyed would ordinarily be, as in the case of a gift to a daughter, an absolute estate, no special words of amplitude are necessary.

Case-law discussed.

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*S.A. No. 1214 of 1926. 28th November, 1929.

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Where a testator executed a will in which he stated that his properties "have been transferred" to his daughter,

Held, the words were sufficient to convey an absolute estate.

Second appeal against the decree of the Court of the Subordinate Judge of Bapatla in A.S. No. 202 of 1924 preferred against the decree of the Court of the Additional District Munsif of Ongole in O.S. No. 156 of 1924 (O.S. No. 695 of 1922, District Munsif's Court, Bapatla).

P. Satyanarayana Rao for appellant.

Ch. Raghava Rao, K. Kameswara Rao and *S. Subramania Sastri* for respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit by a reversioner for a declaration that certain alienations made by the 1st defendant, daughter of the last male holder, in favour of her daughter's son are not binding on the plaintiff, now appellant, beyond her life-time. The plaint alleged that the last male holder, Mahadevudu, who was the elder brother of the plaintiff's father, died intestate. In her written statement the 1st defendant set up a will said to have been executed by Mahadevudu in her favour in 1877 and the case turns upon the validity and effect of this instrument. It is in the first place disputed that it is a will and not a gift-deed. Both the Lower Courts have found that it is a will and have applied the presumption permissible under section 90 of the Evidence Act, relying on that provision to find not only that it is genuine, a finding not now disputed, but also that it was executed by Mahadevudu when in a sound disposing state of mind. Whether section 90 can be used to support a presumption of this latter character is the next question, and the final matter in controversy is the 1st defendant's claim that under the will she took an absolute estate.

The document, the nature of which is thus disputed and of which Exhibit I is a copy, was executed on plain paper, a course correct for a will, incorrect for a transfer *inter vivos*. It is styled a *Marana sasanam,* a word which is usually translated as "will," but which perhaps more unmistakably than that term connects the execution of the document with the executant's death. Unlike a gift-deed it addresses no transferee in the second person. It states that the executant's properties "have been transferred" to his eldest daughter and proceeds to lay down what she shall do, these instructions appearing to

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relate to the time when he is gone and she has taken his place. Stress has been laid by the appellant upon the use of the past tense "have been transferred". I do not think that this is necessarily incompatible with the view that the document is to take effect as from the moment of the executant's death. When an English testator writes "I give and bequeath" he does not mean that the words are to operate upon the property at the time of execution of the will. Next, there is the very significant circumstance that the whole estate is transferred, a course not likely to be adopted in the case of a gift, especially a gift to a woman. It is true that no power of revocation is reserved, but it has never been held that the mere absence of an express provision of this nature disproves the testamentary character of a document. In *Rajammal* v. *Anthiammal*[1] it was found upon an examination of the terms of the deed that it was not revocable in character. Finally there is the circumstance that the document was registered as a will. I do not attach weight to that fact because it shows what the Registrar's opinion was; but it does show what course was adopted by those who must have been conversant with Mahadevudu's intentions. It appears to me that those intentions are clear enough from the several indications which I have enumerated, and I have no hesitation in holding that the document is a will.

The point next raised is that, granting the document to be a will, and that the Lower Courts were justified in presuming execution and attestation under section 90 of the Evidence Act, yet the section does not authorise any presumption in favour of the disposing power of the testator. There is upon this point singularly little authority. I do not find any useful analogy furnished by cases such as *Ubilack Rai* v. *Dallial*,[2] *Ramani Kanta Ray* v. *Bhimnandan Singh*[3] and the English case, In re *Airey*: *Airey* v. *Stapleton*[4], which decides that where a person signs as agent for another the fact of agency cannot be presumed; because it is a fact quite outside and apart from the act of execution. Rather closer comes the decision of an Allahabad Full Bench in *Haji Sheikh* v. *Sukhram Singh*[5] that when the signature of the executant purports to have been made by the pen of the scribe it may be presumed under section 90 that the latter was duly authorised to sign for him. Walsh, A.C.J., distinguishes the agency cases referred to above,

1. (1909) I.L.R. 33 M. 304: 20 M.L.J. 519.
2. (1878) I.L.R. 3 C. 557.
3. (1923) I.L.R. 50 C. 526.
4. (1897) 1 Ch. 164.
5. (1924) I.L.R. 47 A. 31 (F.B.).

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and with reference to the phrase "duly executed" occurring in the section, says:

"In our view the expression 'duly executed' must include all the facts which would be necessary in order to establish due execution before a Court by positive evidence, if the obligation of producing positive evidence were not dispensed with by the presumption."

The question really turns upon the construction to be placed upon "duly executed". The term "executed" by itself, may mean no more than, as the definition stands in the new English Dictionary, "to go through the formalities necessary to the validity of a legal act, *e.g.*, a bequest, agreement, mortgage, etc." But, unless the word "duly" is purely otiose, the phrase must embrace more than that. That was the opinion expressed by Phillips and Odgers, JJ., in an unreported case, A.S. No. 82 of 1924, Phillips, J., observing,

"It is argued that this presumption does not apply to the fact that the testator was in a sound disposing state of mind, but in my opinion this contention cannot be upheld for it does not give effect to the word 'duly'. A will cannot be said to be 'duly' executed by an insane person or an imbecile, and, therefore, by the word 'duly' I think must be meant the execution by a person legally competent to execute the document."

This I think agrees with the statement of the law in Taylor (Vol. I, section 87) that ancient wills and deeds are said to prove themselves, their bare production from natural custody being sufficient. To hold otherwise would be to render the presumption unavailing in the case of most old wills, because the witnesses to execution, who are *ex hypothesi* beyond the reach of the Court, would also be the witnesses to the sound disposing state of the testator. I concur, therefore, in the view of the Courts below upon this point.

Taking the will to be validly proved, the question remains of the nature of the estate the 1st defendant took under it. There is a considerable number of decisions upon the effect of gifts and devises of immoveable property to females—many of them will be found summarised in the Privy Council judgment in *Musammat Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*.[6] Before considering them, it will, I think, save some confusion if the relevant provisions of Hindu Law are borne in mind. The cases fall into two classes, according as they are gifts or bequests to (1) a wife, and (2) a female

6. (1921) L.R. 49 I.A. 25: I.L.R. 1 Pat. 305: 42 M.L.J. 492 (P.C.).

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relative other than a wife. Class (1) is thus dealt with in para. 664 of Mayne, 9th Edition:

> "Immoveable property, when given or devised by a husband to his wife, is never at her disposal, even after his death. It is her *Stridhanam* so far that it passes to her heirs, not to his heirs. But, as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male even though the gift is made in terms which create a heritable estate. It is different if the gift or devise is coupled with an express power of alienation. Whether this is so is of course a question of construction of the terms of the particular gift."

Similar restrictions do not by force of law attach to gifts or bequests by relatives other than the husband. The property becomes what is known as *Saudayika*, "the gift of affectionate kindred", and such property is absolutely at a woman's disposal (para. 662). "She may spend, sell, devise or give it away at her own pleasure."

Now, if these are the principles of law governing such gifts or bequests, it necessarily follows, unless any intention appears to the contrary, that the effect of the gift (and here and elsewhere I include a bequest) is to confer an estate in conformity with them. To hold otherwise would be to assume, in effect, that the donor intended that the woman should take an estate the incidents of which would be at variance with the Hindu Law. This observation may appear to be too obvious to be worth making; but no little trouble has arisen during the arguments addressed to me through losing sight of the fundamental provisions of Hindu Law, and failing to distinguish between an inferred intention and a legal consequence.

In accordance with the two classes of estates given above, the case-law may be divided into (1) cases relating to gifts to wives, and (2) cases relating to gifts to relatives other than wives. Class (1) does not directly concern us, but some examination of the principles upon which the decisions proceeded will be of assistance before turning to Class (2).

Where a gift is made to a wife, the presumption would seem to be, as I have said, that she takes a limited estate unless a contrary intention appears; and this is in general what the cases show. Difference of opinion at one time arose whether the intention must be shown by an express declaration of power to alienate, as was held by the Allahabad High Court in *Surajmani* v. *Rabi Nath*[7], or whether it was enough that "words of amplitude"—some expression sufficient to show that donor's

7. (1903) I.L.R. 25 A. 351.

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intention to confer more than the estate which the wife would otherwise get under Hindu Law—are used. In *Ramachandra Rao* v. *Ramachandra Rao*[8] and *Bhaidas Shivdas* v. *Bai Gulab*[9] the Privy Council has set this point at rest by pronouncing for the latter alternative. We are not here concerned with the discussions, as for instance in *Ramachandra Rao* v. *Ramachandra Rao*[10], where the word of amplitude accepted was "inam," and in *Surajmani* v. *Rabi Nath Ojah*[11] and *Bhaidas Shivdas* v. *Bai Gulab*[9], where it was "malik," as to the sufficiency of the language to establish intention. Perhaps the clearest as well as the most authoritative (being the most recent) pronouncement of the Privy Council upon the principle to be observed in dealing with this class of cases is contained in *Narsingh Rao* v. *Maha Lakshmi Bai*.[12]

Their Lordships say at page 389:

"In their Lordships' opinion there is nothing so far in the deed to cut down the gift or prevent the Rani from taking such an estate in the properties, which are the subject of the gift, as a wife takes in immoveable property given her by her husband. According to the Hindu Law, such property is taken by her as *stridhan* and is descendible to her heirs and not to his, and would devolve first on her daughter and her daughter's daughter and failing them on her daughter's son, thus effectually excluding Balwant; but over such property, it is stated by Mr. Mayne, paragraph 664, she would have no right of alienation unless the gift was coupled with an express power of alienation, or, as has been held by this Board, unless there are words of sufficient amplitude to confer it upon her."

Here we have clearly expressed the principle which I suggested at the start is indisputable, that a woman gets the estate which Hindu Law confers upon her unless there are words to restrict or amplify it. Odgers and Jackson, JJ., have in *Illapavuluri Chelapati Rao* v. *Patchi Golla Subba Rao*[13] decided a case upon this basis. It is unnecessary for me to discuss another case of this Court, *Kanakammal* v. *Baktavatsulu Naidu*[14], further than to say that the learned Judge who wrote the leading judgment, Ramesam, J., certainly did not take a less liberal view of the rights passing to a woman by gift or devise than the other authorities I have cited.

If that is the principle to apply to a gift to a wife, it is difficult to find any reason why it should not apply to a gift to a woman other than a wife, for instance to a daughter, as

8. (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320: 43 M.L.J. 78 (P.C.).
9. (1921) L.R. 49 I.A. 1: I.L.R. 46 B. 153: 42 M.L.J. 385 (P.C.).
10. (1918) I.L.R. 42 M. 283: 36 M.L.J. 306.
11. (1907) L.R. 35 I.A. 17: I.L.R. 30 A. 84: 18 M.L.J. 7 (P.C.).
12. (1928) L.R. 55 I.A. 180: I.L.R. 50 A. 375: 55 M.L.J. 42 (P.C.).
13. (1928) 117 I.C. 289.
14. (1922) 44 M.L.J. 23.

Swarna Kotayya v. Vardhanamma.

here. Under Hindu Law she takes an absolute estate, and the presumption that she takes it can only be rebutted by the employment of restrictive language. It is true that this method of construction does not appear very clearly upon the face of any early Privy Council judgment, *Moulvie Mahomed Shumsool Hooda* v. *Shewukram*[15] and if that case stood alone and uninterpreted by later decisions it might be reasonable to deduce from it that whenever a Hindu makes a gift or bequest to a woman not his wife, he intends, unless he demonstrates the contrary, to bestow only a woman's estate. As was pointed out in *Mahim Chandra Sarkar* v. *Hara Kumari Dasee*[16], however, such a view would mean in effect that the presumption was that the donor intended his gift to have an effect different from the effect ordained by Hindu Law; because every Hindu may be supposed to know that a daughter, for example, takes an absolute estate in such circumstances. The judgment, properly understood, seems only to lay down that in construing a will or gift-deed it is necessary to bear in mind that the testator or donor is a Hindu; and, further, that this consideration should not be lost sight of, in particular, where there is ambiguity in the terms. In *Ramachandra Rao* v. *Ramachandra Rao*[10] Wallis, C.J., observes:

> "We must, I think, take it to be now settled, at any rate so far as this Court is concerned, and until the decisions to which I have referred are overruled by higher authority, that the rule laid down by the Judicial Committee in *Moulvie Mahomed Shumsool Hooda* v. *Shewukram*[15] is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument before the Court."

In the same case Seshagiri Aiyar, J., thought that where the language was ambiguous, recourse could be had to the ordinary notions of Hindus as a rule of construction to find out what the intention of the donor was; but where the words employed are clear and unambiguous, no matter who the donee is, the language should be given effect to. He supported this principle by a reference to section 8 of the Transfer of Property Act.

A similar view has been taken by Benches of this Court in more than one recent case. In *Rajamanicka Chettiar* v. *Manickam Chettiar*[17] (to which in facts and *ratio decidendi* *Yellappa* v. *Golla Swami*[18] is closely parallel as to need no separate

10. (1918) I.L.R. 42 M. 283: 36 M.L.J. 306.
15. (1874) L.R. 2 I.A. 7.
16. (1914) I.L.R. 42 C. 561.
17. (1924) 47 M.L.J. 723.
18. (1924) 20 L.W. 579.

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notice) a brother bequeathed property to sisters directing that they should "enjoy" it. After holding that there is no presumption against a woman taking an absolute estate, the learned Judges deemed "enjoy" to be a word of sufficient amplitude to convey absolute rights. As to this, it is perhaps worth while to point out that the phrase "sufficient amplitude" was used by the Judicial Committee as in *Bhaidas Shivdas* v. *Bai Gulab*[9] and *Ramachandra Rao* v. *Ramachandra Rao*[8], where a transfer to a wife was in question and it was necessary to consider whether the language used raised the estate from qualified to absolute. Where the estate conveyed would without such words be, under Hindu Law, an absolute one, the view to which I can discover no objection, either on general principles or on recourse to the authorities, is that no words of amplitude are necessary.

In a Calcutta case, *Mahim Chandra Sarkar* v. *Hara Kumari Dasee*[16] which I have already mentioned in connection with the construction of *Moulvie Mahomed Shumsool Hooda* v. *Shewukram*[15], a bequest to a daughter was in question, and the testator was deemed to have intended to confer an absolute power of alienation. There is nothing, I think, in this case in conflict with the principle I have attempted to extract. It was presumed that the testator knew the Hindu Law and had its effect in contemplation in framing his will.

The conclusion I draw is, that where under Hindu Law a bequest to a woman would convey the whole estate, it is permissible to construe the will free from any presumptions created by her sex. If the words used would invest a male legatee with an absolute estate, so would they invest a female legatee. If this test is correct, I regard the words "have been transferred" unattended as they are by any qualification, as sufficient to achieve that object. They are appreciably stronger, in my view, than the word "enjoy" which was held to show a similar intention in the two Madras cases above cited.

I agree accordingly with the Courts below that the document in controversy is a will, that it has been proved to be validly executed by Mahadevudu, and that it passed an absolute interest in the property to the 1st defendant. The plaintiff's suit must

8. (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320: 43 M.L.J. 78 (P.C.).
9. (1921) L.R. 49 I.A. 1: I.L.R. 46 B. 153: 42 M.L.J. 385 (P.C.).
15. (1874) L.R. 2 I.A. 7. 16. (1914) I.L.R. 42 C. 561.

accordingly fail and it is unnecessary for me to consider the further question whether in the circumstances of the case, and had these findings been in his favour, he should be found entitled to a declaration under section 42 of the Specific Relief Act. Swarna Kotayya v. Vardhanamma.

The second appeal is dismissed with costs.

S.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE SUNDARAM CHETTY AND MR. JUSTICE PAKENHAM WALSH.

Parameswara Pattar .. *Appellant* (Plaintiff).* F. B. Parameswara Pattar, *In re.*

Court Fees Act (VII of 1870), S. 17—Suit for possession and mesne profits—Whether distinct subjects and as such liable to separate Court-fee.

In a suit for possession of immoveable property and past mesne profits Court-fee is payable on the aggregate value of both the reliefs.

Kishori Lal Roy v. *Sharut Chunder Mozumdar,* (1882) I.L.R. 8 C. 593 (F.B.), *Reference under the Court Fees Act,* 1870, *S.* 5, (1894) I.L.R. 16 A. 401 and *Nauratan Lal* v. *Wilford Joseph Stephenson,* (1918) 4 Pat. L.J. 195, followed.

Reference by the Master (Taxing Officer) of the High Court under section 5 of the Court Fees Act as to the proper amount of Court-fee payable on the Memorandum of Appeal in the appeal sought to be preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Ottapalam in O.S. No. 33 of 1925.

K. Kuttikrishna Menon and *V. K. Madhavan Nair* for appellant.

The judgment of the Court was delivered by

Sundaram Chetty, J.—In this reference, the point arising for determination is, whether in a suit for possession of immoveable property and mesne profits, Court-fee should be paid on the aggregate value of both the reliefs, or on the value of each of the reliefs separately. The question turns upon the applicability of section 17 of the Court Fees Act to this case. That section says, that where a suit embraces two or more *distinct subjects,* Court-fee has to be paid separately on the value of each subject, and not on the aggregate value of all the reliefs. Sundaram Chetty, J

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*S.R. No. 25997 of 1929. 4th August, 1930.

F. B.

Parameswara Pattai, *In re.*

Sundaram Chetty, J.

The word "subject" in this section is somewhat obscure in its meaning, and has been held in some decisions to be not capable of precise definition. Ordinarily, the right or title to the land is the basis for the claim for possession of the land, as also for mesne profits, and it cannot, therefore, be deemed, that the two claims are so disconnected, without any inter-relation, as to form *distinct subjects,* under section 17 of the aforesaid Act.

The Full Bench decision of the Calcutta High Court, in *Kishori Lal Roy* v. *Sharut Chunder Mozumdar*[1], is a clear authority for holding that the claim for possession and the claim for mesne profits should be taken as one entire claim, for the computation of the Court-fee, and not as distinct subjects. The question has been viewed by Garth, C.J., in several aspects, and due importance has been attached to the uniform practice prevalent in the whole country in respect of this matter, which a Court of Justice ought to be slow in changing to the prejudice of the suitor, unless it sees clear and weighty reasons for so doing. With this view, we are in agreement. This decision has been followed by the Allahabad High Court in *The Reference under the Court Fees Act,* 1870, *S.* 5[2].

There seems to be no decision of this High Court directly bearing on the present question. In *Ponnammal* v. *Ramamirda Aiyar*[3] the Full Bench has held that the claim for possession and the claim for mesne profits are separate causes of action, though they may arise out of one act of dispossession. But that decision is for the purpose of Order II, Rules 2 and 4 of the Code of Civil Procedure. The question remains whether separate causes of action would invariably be the criterion for treating the claims based on them as distinct subjects under section 17 of the Court Fees Act. In the Full Bench case in *Kishori Lal Roy* v. *Sharut Chunder Mozumdar*[1] this does not appear to have been taken as the deciding test. In a case dealt with by the Patna High Court, it is stated that two views are possible as to the meaning of the word "subject" in this section. One is that the word "subject" relates back to section 7 where the various subjects of suits are put under different heads. The other view is that the word "subject" means "cause of action". (*Nauratan Lal* v. *Wilford Joseph Stephenson*[4].) But, however, it was held, on the strength of the Full Bench decision in *Kishori*

1. (1882) I.L.R. 8 C. 593 (F.B.). 2. (1894) I.L.R. 16 A. 401.
3. (1914) I.L.R. 38 M. 829: 28 M.L.J. 127 (F.B.).
4. (1918) 4 Pat. L.J. 195.

F. B.

Parameswara Pattar, *In re.*

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Lal Roy v. *Sharut Chunder Mozumdar*[1] that the long continued practice should not be disturbed and that Court-fee may be paid on the aggregate value of the reliefs, viz., claim for possession and claim for mesne profits. The preponderance of authority is in favour of not treating these two claims as distinct subjects under section 17 of the Court Fees Act.

There being no definition of the word "subject" in the Act, we think, we need not attempt to define it in the present case, and should only be guided by the long course of practice.

We think, that any doubt or obscurity as to the precise meaning of the word "subject" in this section should be cleared by the Legislature in due course.

We answer this reference by stating, that in a suit for possession of immovable property and past mesne profits Court-fee is payable on the aggregate value of both the reliefs.

K.C. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE REILLY.

Periyaswami Moopan and another .. *Prisoners.**

Periyaswami Moopan, *In re.*

Evidence Act (I of 1872), S. 30—Interpretation of "confession"—Confession by a co-accused—Whether can be taken into consideration by the Court.

Two persons, accused (1) and (2), were convicted for murdering another person by the Sessions Judge. By a statement to a Sub-Magistrate accused (2) confessed that accused (1) alone murdered the deceased and that himself took no part in it except that, on being threatened by accused (1), he had helped him to throw the body of the deceased into a burrowed pit. On the question whether the Sessions Judge was at liberty under S. 30 of the Evidence Act to take into consideration against accused (1), a statement made by the co-accused, because it was a confession of causing evidence of murder to disappear,

Held, that "confession" in S. 30 of the Indian Evidence Act means confession of the offence for which the accused are being tried.

Confession in S. 30 cannot reasonably be interpreted to mean a confession of any offence in the world, nor even of any minor offence included in the offence for which the accused persons are being tried, nor of any offence connected with that offence, nor of any other offence which may be disclosed by the evidence, but only of the very offence for which they are being tried, "offence" always including, under the explanation to the section, abetments and attempts.

Empress of India v. *Ganraj,* (1879) I.L.R. 2 A. 444, followed.

Shivabhai Becharbhai v. *Emperor,* (1926) I.L.R. 50 B. 683, dissented from.

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*Ref. Trial No. 62 of 1930. 14th July, 1930.

1. (1882) I.L.R. 8 C. 593 (F.B.).

Periyaswami Moopan, *In re.*

Per *Reilly, J.*—If in this respect two interpretations of the section were grammatically possible, the ordinary canons of interpretation would compel us to adopt in the interest of accused persons the stricter and narrower construction, the construction which gives the less scope to the very exceptional extension of what may be used against an accused person at his trial.

Trial referred by the Court of Session of the Madura Division for confirmation of the sentences of death passed upon the said prisoners in Case No. 17 of the Calendar for 1930.

E. Antony Lobo for 1st accused.

K. W. Rama Rao for 2nd accused.

The Acting Public Prosecutor on behalf of the Crown.

Cr. Appeal No. 232 *of* 1930.—Appeals by the prisoners against the said sentences.

The Court delivered the following

Waller, J.

JUDGMENTS. *Waller, J.*—I agree that Exhibit G is a statement that should not have been taken into consideration against the 1st accused. He and the maker of the statement were being jointly tried for murder and Exhibit G was not a confession of murder jointly affecting both. The law on the point was correctly laid down by Straight, J., many years ago in the Allahabad case *Empress of India* v. *Ganraj*[1] cited by my learned brother. As regards the case *Shivabhai* v. *Emperor*[2] a statement by one of the accused that he *by himself* had burnt the clothes of a murdered man and would show the place was treated as a confession of participation in the murder and admissible under section 27 of the Evidence Act against him. To that extent, the decision seems to be correct, but when it goes on to put forward some circumstantial grounds on which the Judges held that the confession "indirectly affected" another accused not named in it and could, therefore, be used against him under section 30 of the Evidence Act, I find myself wholly unable to follow it.

Apart from the so-called confession, there is, I think, a strong circumstantial case against the 1st appellant. Against the 2nd, there is that and more, that is to say, his statements, Exhibits G and H. They show that he was present when the murder was committed. That they give a true account of what happened is incredible. The murder and disposal of the body could not have been the work of one man. Nor is it believable that the 1st appellant would have suddenly murdered Rama-

1. (1879) I.L.R. 2 A. 444. 2. (1926) I.L.R. 50 B. 683.

Periyaswami Moopan, *In re.*

Waller, J.

swami in the presence of the 2nd appellant without the previous knowledge and consent of the latter. The scene of the murder was probably deliberately chosen. It was a place where the Periyar channel, which was then certain to be in flood, runs close to the road. Doubtless the intention was, as stated in Exhibit H, to throw the body into the channel. Apparently, in the darkness, the murderers mistook the water in the burrow-pit for the channel. I agree in the order proposed by my learned brother.

Reilly, J.

Reilly, J.—In this case the appellants, accused 1 and 2, have been convicted by the Sessions Judge of Madura of murdering one Ramaswami Moopan, with whom it has been found they were dealing in sheep as partners.

The learned Sessions Judge has taken into consideration against accused 1 a statement, Exhibit G, made by accused 2 before the Sub-Magistrate of Dindigul. In that statement accused 2 does not admit that he took any part in the murder of Ramaswami; he says that accused 1 killed Ramaswami and then compelled accused 2 by a threat to assist in disposing of the body. The learned Public Prosecutor has contended that Exhibit G is a statement which the Sessions Judge was at liberty to take into consideration against accused 1 under section 30 of the Evidence Act because it was a confession, not indeed of murder, but of causing the evidence of murder to disappear, which is an offence punishable under section 201, Indian Penal Code. In my opinion that contention is mistaken. Section 30 of the Evidence Act is a very exceptional, indeed an extraordinary, provision, by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that we do not stretch it one line beyond its necessary intention. It is true that the section provides only that the confession of one accused person may be "taken into consideration" against his fellow-accused. As I understand the section, the confession cannot take the place of evidence against the co-accused; nor can it be added to supplement evidence otherwise insufficient. As I understand the matter, the provision goes no further than this—where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in section 30 may be thrown into the scale as an additional reason for believing that evidence. But even for that limited purpose the confession must be of the kind intended by the

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Legislature when enacting section 30. What kind of confession is intended? The words of the section are:

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved."

In my opinion "confession" in that collocation of words cannot reasonably be interpreted to mean a confession of any offence in the world, nor even of any minor offence included in the offence for which the accused persons are being tried, nor of any offence connected with that offence, nor of any other offence which may be disclosed by the evidence, but only of the very offence for which they are being tried "offence" always including under the explanation to the section abetments and attempts. That appears to me to be the plain meaning of the words. To interpret the word "confession" in the section in any wider sense is to accuse the Legislature of using loose language in a matter of great importance. In my opinion we must read the word "confession" as if it were followed immediately by the words "of that offence"; and that appears to me to be the plain meaning of the section as read by a reasonable man. And indeed, if that were not the meaning, why should the use of the word "confession" be confined to cases where the accused persons are being tried for the same offence? But, keeping our attention for the moment on the words themselves, if we speak of persons being tried for the same offence and in the same sentence speak of one of them making a confession, how can we mean by "confession" a confession of any other offence unless we are most careless in the use of language? To my mind the words of section 30 of the Evidence Act leave no doubt that the confession mentioned is a confession of the offence for which the accused persons are being tried. If the words left us in any doubt, the nature and effect of the provision might be called in to help us. The provision allows a statement of an accused person, not made an oath, not tested by the cross-examination, to be used against a person tried with him. What can be the justification of a provision at first sight so startling? If, while confessing some minor offence, a man could implicate his fellow-accused in a far more serious offence for which they were being tried, and the confession could then be used against his fellow-accused, would not that be offering to the confessing accused a plain temptation to make himself useful by throwing the serious blame on his fellow-accused while saving his own skin or exposing himself only to a minor penalty? To my mind it is inconceivable that the Legislature had any idea

of offering to any accused person a temptation to such mean and immoral conduct. But, if the confession which may be used is confined to a confession of the very offence for which the accused persons are being tried, the position is different. Then at least the confessing accused has nothing to gain by his confession; on the contrary he exposes himself to the very penalty which he helps to bring down on his fellow-accused. To such a confession it is not entirely unreasonable to allow some weight, and the danger that it may be untrue is at least very greatly reduced. If we examine the effect and nature of the provision, we arrive again at the same result, that it is only such a confession which the Legislature can have allowed by section 30 to be taken into consideration. Lastly, if in this respect two interpretations of the section were grammatically possible, the ordinary canons of interpretation would compel us to adopt in the interest of accused persons the stricter and narrower construction, the construction which gives the less scope to this very exceptional extension of what may be used against an accused person at his trial. Examining the section in any or all these ways, in my opinion, we must arrive at the same conclusion, namely, that "confession" in section 30 of the Evidence Act means confession of the offence for which the accused persons are being tried.

It appears to me surprising that any other interpretation of the section should now be put forward. The interpretation I have indicated as proper was adopted by Straight, J., in *Empress of India* v. *Ganraj*[1] and his view has been followed in a great many later cases. The learned Public Prosecutor quoted in his favour *Shivabhai* v. *Emperor*.[2] So far as that case deals with this point, I must say with very great respect that I neither agree with it nor understand it.

In Exhibit G, as I have mentioned, accused 2 does not admit that he took any part in the murder of Ramaswami Moopan: he admits only that he helped to dispose of the corpse. That is not a confession of the offence of murder for which accused 1 and 2 were tried, and therefore in my opinion the learned Sessions Judge in dealing with accused 1 should have excluded Exhibit G entirely from consideration. If that is done, what is the evidence against accused 1? There is evidence, which I see no reason to doubt, that for a few weeks accused 1 and 2 had been trading in sheep in partnership with

1. (1879) I.L.R. 2 A. 444. 2. (1926) I.L.R. 50 B. 683.

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Ramaswami Moopan and that they had taken some sheep bought in the Trichinopoly District south through Dindigul to Madura. There is evidence that on Thursday, 28th November, 1929, they arrived at Madura with 12 sheep and stayed that night with P.W. 27, who knew accused 2, as accused 2 had married and divorced a daughter of P.W. 27's neighbour; on the Thursday they sold 2 of the sheep, and on the Friday they sold the rest with the help of P.W. 27, who himself bought the last one for Rs. 11-8-0; the money for the sheep sold on the Friday was given to Ramaswami Moopan, who was carrying a money bag; about 4 P.M., on Friday, 29th November, accused 1 and 2 and Ramaswami left P.W. 27's shop at Madura saying that they were going to walk home. This evidence of what happened at Madura is given by P.W. 27, whom there is no reason to distrust. The villages of Ramaswami and of accused 1 and 2 are close to each other, a few miles north-west of Dindigul. Their way from Madura lay along the Madura-Dindigul trunk road, which from Madura runs first slightly north of west and then slightly west of north. On the morning of Saturday, 30th November, Ramaswami's dead body was found near Vadipatti with 9 cut wounds on it floating in water in a burrow-pit by the side of the road, between it and the Periyar channel close by, 17 miles from Madura, at a point which the accused and Ramaswami would have reached in their journey at some time in the previous night. Though an inquest on the body, on which the only money found was 2½ annas, was held on 30th November and a photograph of it and prints of its fingers were taken, it was not identified until 12 days later. P.W. 11, Ramaswami's widow, gives evidence that on Sunday, 1st December, she met accused 2 at a shandy near her village and asked him where Ramaswami was. Accused 2 replied: "We went to Madura and sold sheep. He got his share in the sale and went to the east to buy sheep and would be returning in 2 or 3 days. Why are you searching for him?" P.W. 12, Ramaswami's brother and P.W. 14 say that they went on Monday, 2nd December, to the village of the accused and asked accused 1 where Ramaswami was. Accused 1 told them that they had sold the sheep at Madura, that Ramaswami had got his share of the proceeds and had gone to "eastern parts" to buy other sheep and would be back in 2 or 3 days. P.W. 12 adds that accused 1 told him that Ramaswami's share of the sale-proceeds was Rs. 57. That the accused gave this explanation to Ramaswami's relations when they became anxious because he did not return is proved not only by oral

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evidence. Exhibit K is a letter, dated 4th December, written by P.W. 20, for P.W. 21, who is the brother of Ramaswami's widow, to their cousin, P.W. 22, who lives in the Trichinopoly District, near the place where Ramaswami and the accused had bought the sheep which they sold at Madura; and that part of the Trichinopoly District is east of the north part of the Madura District, where the accused and Ramaswami lived. Exhibit K runs:

"Our brother-in-law, Palaniamma's (P.W. 11's) husband, went there (*i.e.*, to your place), purchased sheep and went to Madura to sell them. Those who went with him have returned about 7 days ago. When questioned, they say that Ramaswami has gone to eastern parts and I suspected it. So I request you to search for him in those parts and send him back at once and, if he is not found, to inform me about it."

The genuineness of this letter cannot be disputed. Its history in the post is shown by the post-marks on its cover, Exhibit K-1; and Exhibit L is P.W. 22's answer to it, dated 12th December.

That is the evidence against accused 1. It shows that he left Madura on the afternoon of 29th November in company with Ramaswami and accused 2 to walk to their homes; Ramaswami was then carrying a considerable sum of money; next morning Ramaswami's body, with wounds upon it which showed that he had been murdered, was found by the roadside at a point which they had to pass on their journey and would have reached in the night: there was practically no money on the body: the accused went on to their village, and on 2nd December accused 1 gave to P.Ws. 12 and 14 a reassuring but false account of Ramaswami's whereabouts. Accused 1 gives no explanation of this. He does not explain when or where he left Ramaswami nor profess that he had any reason to suppose that what he told P.Ws. 12 and 14 was true. He denies that he ever traded in sheep with Ramaswami and denies that he ever went to Madura with Ramaswami and accused 2. These denials are no doubt false. From the facts that accused 1 left Madura with Ramaswami and accused 2, that on the way they were to travel Ramaswami was murdered and the money on his person removed, and that 3 days later accused 1 gave a deliberately false account of Ramaswami's movements, the proper inference in my opinion is that accused 1 took part in murdering Ramaswami.

Against accused 2 there is the same evidence as against accused 1 except that his statement about Ramaswami's movements was made a day earlier, on 1st December, and was made

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to Ramaswami's widow, P.W. 11. But besides this evidence there is against accused 2 the statement Exhibit G, which he made to the Sub-Magistrate of Dindigul on 16th December. In that statement he admits that he and accused 1 and Ramaswami after they had sold their sheep at Madura left P.W. 27's house in the afternoon; they went along the road, and at midnight, when they were near Vadipatti, accused 2 was walking in front, Ramaswami next and accused 1 last. Accused 1 caught Ramaswami by the feet and threw him down and stabbed him to death. Accused 2 took no part in that, but, when Ramaswami was dead, accused 1 by threatening to stab him made him help in throwing Ramaswami's body into a burrow-pit by the roadside. That statement accused 2 withdrew in the committing Magistrate's Court and at the trial, explaining that he made it because he had been beaten and was afraid. Oddly enough in his appeal petition he says that he did make the statement because he was afraid but that he stated what was true. However accused 2's admissions in Exhibit G are corroborated in a remarkable way. There is evidence that at his own village on 9th December accused 2 told the same story to P.Ws. 12, 14, 15, 16 and 18. They all say that accused 2 then gave them practically the same account of the murder as is given in Exhibit G except that P.Ws. 12 and 18 say that accused 2 told them that he refused to help in throwing the body away and that accused 1 did it by himself. In corroboration of the evidence of P.W. 12 about accused 2's admission on 9th December we have Exhibit H, the statement made by P.W. 12 to his Village Magistrate, P.W. 19, the same day, when he produced accused 2 before him; and the Village Magistrate adds that, when questioned by him, accused 2 admitted that he had told "the Panchayat" what is recorded in Exhibit H. When accused 2 told his story of the murder to P.W. 12 and the other witnesses on 9th December, none of them knew what had become of Ramaswami, still less that he had been murdered near Vadipatti, more than 20 miles away. Nor did the Police of Sholavandan Station, within the limits of which Ramaswami's body had been found, then know whose body it was. On 10th December the Sub-Inspector of Palakanuthu, the Station for the village of the accused, sent P.W. 12, Ramaswami's brother-in-law, to Vadipatti: there on 11th December P.W. 12 learnt that a body had been found, the description of which was like Ramaswami: next day he went to Sholavandan Station and saw Exhibit B, the photograph of the body, which he recognised as that of Ramaswami. I may add that the identification of the body is

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not disputed, as besides the photograph the finger prints taken from the body correspond with those of Ramaswami on a sale-deed executed by him, Exhibit F. But it was because accused 2 told his tale of the murder on 9th December that Ramaswami's fate was discovered and his body identified. Though he has withdrawn his statement, Exhibit G, there is no doubt that his admission in it that he was present when Ramaswami was murdered is true. That is what he admits in Ex. G. But taken with the other evidence that cannot be accepted as the limit of his guilt. In the circumstances it is very highly improbable that, as accused 2 represents, accused 1 fell upon Ramaswami without a word to accused 2 of his intention. Of the 9 wounds found on Ramaswami's body only one, on the right of the neck, cutting the carotid artery, was necessarily fatal. From the fact that so many wounds were inflicted it may be inferred that Ramaswami was not killed without a struggle. Accused 2, according to his own account, stood by and was not responsible for what was done. To my mind in the circumstances the only reasonable inference is that accused 2 took part in the murder, whether he actually had a hand in the struggle, as is probable, or merely stood by on guard.

In my opinion the convictions and sentences of both the accused should be confirmed and their appeals should be dismissed.

K.C. *Convictions and sentences confirmed.*
Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

The Chairman, Municipal Council, Mangalore .. *Petitioner* (Complainant)*

v.

S. Vasudeva Kamath .. *Respondent (Accused).*

The Chairman, Municipal Council, Mangalore *v.* Vasudeva Kamath.

District Municipalities Act (V of 1920), *Ss.* 191 (1), 199, 200, 201, 202, 203, 318 *and* 338—*Building a latrine without the permission of the Municipality—Effect of—Nature of the offence—Powers of the Chairman of the Municipality.*

A person wanted to construct a new latrine in the compound of the market ward of a town. He applied to the Municipality for permission to build it in the eastern corner of the compound which was marked on a plan of the site sent along with the letter. The Health Officer inspected

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*Cr. Rev. C. No. 999 of 1929.
Cr. R.P. No. 902 of 1929.

25th April, 1930.

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the spot and found it insanitary and hence the Municipality gave the applicant permission to build in the western corner of the compound instead of at the place where he desired to build it. But they did not mention the reason for not giving the permission to build at the place where the applicant wanted. To a letter by the applicant to the Municipality requesting them to correct the error "western corner" which he thought had crept in for the words "eastern corner," there was no reply for some time. Hence he began constructing the latrine.

Held, that so far as permission was needed to the construction at the place where it was built, the latrine was constructed without any permission whatever;

(2) that by reason of Rule (1) of the rules made by the Governor-General in Council empowered under S. 191, clause (1) of the District Municipalities Act, the Chairman or the Council of a Municipality would be entitled to refuse an approval of a particular site for the erection of a latrine on the ground that such erection would be insanitary; and

(3) that the offence of commencing construction without the permission of the Chairman was one falling under S. 317 of the Act read with S. 199.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional 1st Class Magistrate, Mangalore, dated 6th September, 1929, in C.A. No. 26 of 1929, preferred against the judgment in C.C. No. 219 of 1929 on the file of the Stationary 2nd Class Magistrate of Mangalore Taluk.

M. A. T. Coelho and *T. R. Ramachandran* for petitioner.

B. Sitarama Rao for respondent.

K. Venkataraghavachari for the Crown.

The Court delivered the following

ORDER.—This is a petition by the Chairman of the Mangalore Municipality to revise the order of the Sub-Divisional 1st Class Magistrate of Mangalore reversing the conviction of the respondent by the Stationary 2nd Class Magistrate of Mangalore for an offence under section 199 read with section 338 of the District Municipalities Act and acquitting him.

The facts are short and practically not in dispute. The respondent is the owner of a compound T.S. No. 127 in the market ward of Mangalore Town. He wanted to erect a new latrine in that compound and made an application to the Municipality on 14th March, 1928, for permission to construct the latrine. The application was accompanied by a site plan and a plan of the building, Exhibits A, A-1 and A-2. The place where the respondent wanted to construct the latrine was the north-east corner of the property. It is in evidence that the

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Health Officer of the Municipality and the Sanitary Inspector inspected the spot when the respondent was present and they, finding that the proposed location of the latrine was unsuitable, pointed out to the respondent a spot at the north-western corner of the property where it might be constructed. The permission was accordingly granted and communicated to the respondent by the order of the Chairman, dated 26th of March, 1928, and a license of permission to erect the latrine at the north-western corner was granted in the usual form of a license with conditions. (*See* Exhibits D and D-1.) On the 10th April the respondent wrote Exhibit C to the Municipal Health Officer stating that he had asked for permission to construct the latrine at the north-eastern corner but was surprised to find that the permission was to construct the latrine at the north-western corner and suggested that the words "western" and "west" in the license were a clerical error for "eastern" and "east" and requested that the alleged error may be corrected and the license returned with its enclosures. It is admitted that the Municipality has not corrected the so-called error or returned the license to the respondent permitting him to construct the latrine at any other place except that mentioned in the license returned by the respondent. The Municipality, however, moved in the matter by asking the Health Officer to again inspect the place. That Officer did so and reported that the place already pointed out is the most suitable, but that the petitioners and his neighbours are objecting, and that there is no other site which is less objectionable. The visit of the Health Officer and the Sanitary Inspector to the spot after the petition, Exhibit C, is spoken to P.W. 1, who also says that the respondent was then present and learnt the result of the visit, namely, that there was no other site except the one already pointed out to him. This appears to have been on or about the 28th April, 1928. In this state of affairs the respondent wrote Exhibit I to the Chairman of the Municipal Council on the 19th of September, 1928, saying that the license had not been returned to him after correction and that unless the license for the place shown by him in his application, namely, the north-eastern corner, were granted to him before the end of October, 1928, he would commence the construction without the permission. Upon this, one Mr. Madhava Rao, Councillor for the ward, at the request of the Chairman visited the property and made another suggestion as to the location of the latrine, and the Chairman requested the Health Officer to communicate to the respondent the site selected by Mr. Madhava Rao as suit-

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able. But the Health Officer protested that the place selected by Mr. Madhava Rao was quite insanitary being only 2 feet from a place of worship used by the local people and that it is very close to the main road adjoining which there is a mutt as well as a temple. He insisted that the north-western corner which had been already pointed out and for which permission had already been given was the only site suitable from a sanitary point of view. Therefore the proposal of Mr. Madhava Rao was never communicated to the respondent, and the position was just the same as when the respondent returned the license for correction. The respondent thereupon began the construction of the latrine where he wanted, that is, at the north-eastern corner. The Municipal Sanitary Inspector discovered this early in January, 1929. Thereupon, on the 2nd of January, 1929, a notice was issued to the respondent by the Health Officer to stop the work. He refused to do so. The Chairman sent another notice on the 8th January. The respondent still persisted and justified himself on the ground that he had already by his letter of the 19th of September, 1928, intimated his intention to commence the construction of the latrine, if no license was issued to him by the end of October, 1928. He also informed the Chairman that the latrine had been completed "yesterday evening". Thereupon this prosecution was started against the respondent for constructing the latrine without permission.

The Stationary Sub-Magistrate held that the respondent was guilty under sections 199 and 338 of the District Municipalities Act, although in his view the respondent had been hardly treated by the Municipality by no reply being sent to him to his letter of the 19th September, 1928. He, therefore, fined the respondent Rs. 15. In appeal, the Sub-Divisional Magistrate set aside this conviction on two legal grounds: first, according to the Magistrate, it was not a case of construction of a building without permission, because permission had already been granted, although it was for a different site; and secondly, according to the Magistrate, the offence fell not under section 338 of the Act but under section 317 of the Act.

It seems to me that the Magistrate's opinion is wrong on the first point. To say that where a Municipality gives permission for a building in a particular place, it amounts to a permission to build at another place, is, in my opinion, not in keeping with either sense or law. The permission granted by the Municipality was a permission to erect the latrine at the north-western corner of the property. It was not a permission to

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erect it elsewhere, and to say that the Municipality permitted the erection of the latrine and that the variation of the location is a matter covered by section 205 of the District Municipalities Act is to impute to the Municipality what it did not do and to make non-sense of the careful provisions of the District Municipalities Act and the rules thereunder as to construction of buildings. I have not the least doubt that, so far as permission was needed to the construction at the place where it was built, the latrine was constructed without any permission whatever. The view on this point of the Sub-Divisional Magistrate is clearly wrong.

But the learned Advocate for the respondent attempted to support the order of the Sub-Divisional Magistrate on two other grounds. His first point was that the case comes under sections 201 and 202 of the District Municipalities Act, which say that the Chairman shall within thirty days of the approval of the site under section 200 grant or refuse permission for the construction and on his failure to give or refuse his approval of a building site or his permission to execute any work, the Council shall be bound, on the written request of the applicant, to determine whether the approval or permission should be given or not, and that if the Council does not, within one month from the receipt of such request, determine the question, such approval or permission shall be deemed to have been given. His second argument is that the Chairman or the Municipal Council could not refuse permission to erect the latrine at the spot pointed out by the respondent as the refusal could not fall within any of the grounds mentioned for such refusal in section 203 of the District Municipalities Act.

Both these contentions are, in my opinion, incorrect. By section 108 the Chairman is not empowered to grant permission to construct a building until the site has been approved, and by section 199 the construction or reconstruction is not to be begun until the Chairman has granted permission for the execution of the work. What happened in this case was that the respondent was told in writing that he could have permission to construct his latrine on condition that he erected it at a place mentioned in the license. This had no other meaning and was known by the respondent to have no other meaning than that the site proposed by him for the latrine was not approved. His own letters show that beyond possibility of doubt. Immediately after the receipt of the license, he returned it to be corrected thereby showing that he knew that the site proposed by him was

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not approved. Again in his letter of the 19th September he wrote to the Chairman saying that his license had not been corrected and intimated that, unless it was so returned before the end of October, he would proceed to construct the latrine without any permission. There is no warrant for the argument that there was any failure by the Chairman to intimate his refusal of the site proposed by him to the respondent. Therefore, section 202 which only applies on default of a decision by the Chairman has no application to the case. It may also be added that, even if that section had any application, the respondent did not apply to the Municipal Council to make his own decision, nor wait for one month for the Council to do so. He has written no letter to the Municipal Council throughout the correspondence. His letter of the 19th of September is addressed to the Chairman. The first argument, therefore, fails.

The argument based upon section 203 is that the work proposed by the respondent would not contravene any provision of any law or some specified order, rule, declaration or by-law made under any law as required by section 203, clause (1). In short, the argument comes to this, that under the District Municipalities Act and the rules thereunder, there is no power in the Chairman or the Council of a Municipality to decide the location of a latrine proposed to be constructed by the owner of property in a Municipal area and to refuse permission if the proposal is to locate it in an insanitary or otherwise objectionable spot. I find myself unable to concur in this view. By section 191, clause (1), the Governor-General in Council is enabled to make rules, among other things, for the regulation or restriction of the use of sites for building. Rule (1) of the rules made under this power says that "no piece of land shall be used as a building site, if the Council considers that the site is insanitary, or that it is dangerous to construct a building thereon." It is argued that this only applies to cases of sites being considered insanitary or dangerous for the construction of buildings thereon generally, such as the place being a bog or a marsh or a feverish area and that it does not apply to the selection or exclusion of sites on the ground of their being sanitary or insanitary for specific purposes such as erection of latrines. I do not find sufficient ground to restrict the generality of the language in the way suggested. I think the rule applies to and prohibits the erection of buildings on lands insanitary or dangerous both, where the insanitary or dangerous character applies to all kinds of buildings or only to a particu-

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lar class of buildings intended to be erected thereon. By reason of this rule, the Chairman or the Council of a Municipality would, in my opinion, be entitled to refuse the approval of a particular site for the erection of a latrine on the ground that such erection would be insanitary. That was what happened in this case.

On the second ground on which the Sub-Divisional Magistrate based his decision, namely, that the offence was not one falling under section 338 of the District Municipalities Act but under section 317, I think he was right. Section 338 applies to cases where no penalty has been specially provided by the Act, whereas this was a case of commencing the construction of a building without permission of the Chairman which is specifically provided for by section 317 read with section 199. But this was not enough to acquit the respondent as both the offences were summons cases. What the Sub-Divisional Magistrate should have done was, to alter the conviction to one under the proper section and pass such sentence as he thought fit in appeal. The result is that the order of the Sub-Divisional Magistrate acquitting the respondent is set aside and the papers in the appeal will be sent back to him for hearing and disposal according to law.

K.C. *Order set aside: Appeal remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Sathuluru Seetharamanujacharyulu .. *Appellant* (Plff.)*

v.

Narra Venkatasubbamma and another .. *Respondents (Defendants).*

Seetharamanujacharyulu *v.* Venkatasubbamma

Hindu Law—Maintenance suit by a widow—Maintenance amount made specific charge on specific items of property of the joint family—Another creditor holding simple money decree against a member of the joint family—Sale in execution thereof of one of the charged items—Doctrine of lis pendens—*Priority of joint family debt over maintenance claims—Whether possible—Charge to take effect, from when.*

A Hindu widow claimed against her husband's brother and the alienees from him of certain joint family properties, for maintenance due to her from the joint family and prayed that the same might be made a charge on

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*S.A. No. 992 of 1925. 11th April, 1930.

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certain specified items of immoveable properties. She obtained a decree to that effect. After the filing of her plaint but before the passing of the decree therein, a creditor of her husband's brother upon a promissory note, executed a decree obtained against him, brought to sale one of the items charged for the maintenance due to the widow, purchased it, and sold it in turn to the plaintiff. In a suit by the plaintiff to declare the sale of the same item by Court auction to the second defendant, in execution of the widow's maintenance decree, is not valid and also to restrain by injunction the second defendant from taking possession of the same,

Held, (1) that S. 52 of the Transfer of Property Act applied to a suit by a Hindu widow in which she claimed to have her maintenance charged on specific items of immoveable property mentioned in her plaint.

The principle of the doctrine of *lis pendens* applies to sales *in invitum* that takes place during pendency of such suits.

(2) that a decree obtained by the plaintiff in such a suit creating a specific charge over a specific item of immoveable property mentioned in the plaint, operated to give her a charge from the date of the plaint and not as from the date of the decree only unless there be anything in the decree to the contrary.

(3) that without sanction of the Court transfers *inter vivos* or sales *in invitum* during the pendency of such suit could not prevail over such charge claimed in the plaint and granted by the decree.

(4) that a simple money decree-creditor of a joint Hindu family had no priority over such charge granted by the decree in the absence of fraud or collusion. Hence an auction purchaser, during the pendency of such maintenance suit, of an item of property over which a charge was claimed in the plaint and was granted by the decree, who purchased in execution of a simple money decree binding on the family was not entitled to priority over another auction purchaser of such properties in proceedings taken to execute such maintenance decree.

Case-law reviewed and discussed.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in Appeal Suit No. 31 of 1925 (A.S. No. 75 of 1924, Sub-Court, Ellore), preferred against the decree of the Court of the Additional District Munsif of Ellore in Original Suit No. 116 of 1923 (O.S. No. 318 of 1922, District Munsif's Court, Nuzvid, at Bezwada).

G. Lakshmanna for appellant.

K. Kameswara Rao for respondents.

This second appeal coming on for first hearing before Odgers, J., the Court delivered the following

Odgers, J

JUDGMENT. *Odgers, J.*—In this case an interesting question of law was opened, namely, as to whether the maintenance decree-holder with a charge (1st defendant) was to be held to have a superior claim to the plaintiff who purchased from a Court auction purchaser. It is admitted by Mr. Lakshmanna

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for the appellant that if the debt for which the property was brought to sale in execution of Small Cause No. 1906 of 1916 was not a debt binding on the family the claim of the 2nd defendant must prevail. The District Munsif held that the decree debt in S.C.S. No. 1906 of 1916 was not a binding debt which could prevail against the claim of the maintenance of the 1st defendant. He gives various reasons which have induced him to come to this conclusion and they are set out in paragraph 6 of his judgment. He observed *inter alia* that "the extract from the suit register could have been produced to show the nature of the claim in S.C.S. No. 1906 of 1916." There are, however, various other circumstances which induced him to come to the conclusion that it has not been proved that the debt is a debt binding on the family. The Subordinate Judge, on the other hand, mainly or exclusively from the fact of the extract from the suit register which he admitted and marked as Exhibit H comes to the opposite conclusion. It is said that this Exhibit H supplies the missing link because it shows that the promissory note which is referred to in the endorsement of Exhibit B is the very note referred to in the suit register. The circumstance under which the admission of Exhibit H was applied for and allowed seems to be somewhat extraordinary. The plaint was filed on the 20th June, 1922 and the decree in the first Court was not made until the 23rd November, 1923. On the 29th January, 1924, an appeal was filed in the Lower Appellate Court and on the 4th December, 1924, there was a petition to receive Exhibit H, that is to say, over a year after the learned District Munsif had commented on its absence and nearly 2½ years from the institution of the suit. No order was made on this petition which is extremely vague in its allegations, the affidavit in support saying "it is, therefore, very necessary that these two documents of which Exhibit H is one should be received" without saying any reasons why this document could not have been filed in the District Munsif's Court. The matter is governed by Order 41, Rule 27 (*d*). The Appellate Court did not require the document to be produced so that the Court must be satisfied that there is some other substantial cause to allow such document to be produced. No substantial cause is alleged and further with regard to the proviso in sub-section (2) the Court has not recorded any reason for its admission. On the 16th April, 1925, two days before judgment in appeal was delivered, the Judge ordered this extract from suit register to be received and marked Exhibit H. Cases having gone to the length of saying

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Odgers, J.

that such reception of additional evidence under those circumstances is totally without jurisdiction. In *Kaki Mutyalu* v. *Kanigolla Siva Raghavayya*[1] a Bench of this Court held that the admission of a document in evidence was illegal where no reasons were recorded. There was no application for the admission of the evidence and no reasons were shown for failure to produce the document in the Court of first instance. Apart from this irregularity or illegality in admitting Exhibit H in evidence, the learned Judge has, to my mind, failed to deal with some of the aspects of this question of fact that presented themselves to the District Munsif. It is important to have this question of fact settled and I must, therefore, send the case down for a finding to the Subordinate Judge as to whether or not the debt in question, *i.e.*, the decree-debt in S.C.S. No. 1906 of 1916, is a binding debt of the family. The Subordinate Judge need not again enter into the question as to whether it takes precedence or not of the claim for maintenance of the 1st defendant. That is a question of law which if necessary can be argued later on. As I have said, it seems to me that on the authority of *Kaki Mutyalu* v. *Kanigolla Siva Raghavayya*[1] the reception of Exhibit H was illegal. If the appellant here can persuade the Subordinate Judge that substantial reasons did exist for his failure to produce the documents in evidence in the Court of the District Munsif, the Subordinate Judge may consider the same. Otherwise, the finding is to be returned on the evidence on record. Six weeks for finding and 7 days for objections.

In compliance with the order contained in the above judgment, the Court of the Subordinate Judge at Masulipatam submitted the following

FINDING.—This appeal has been remanded for a finding as to whether or not the decree debt in S.C.S. No. 1906 of 1916 was a debt binding on the family of the 1st defendant.

* * * * *

My finding is that the debt in S.C.S. No. 1906 of 1916 was a debt binding on the family of 1st defendant. I may add that I have not taken Exhibit H into consideration. A petition was filed before me for its admission but it was rejected for the reasons given on it.

This appeal again came on for hearing for final disposal before Mr. Wallace and Anantakrishna Aiyar, JJ.

The Court delivered the following

JUDGMENT.—The first defendant (Venkatasubbamma) filed on 11th January, 1916, O.S. No. 451 of 1916, on the file of

1. (1915) 3 L.W. 163.

the Temporary District Munsif's Court of Gannavaram against her deceased husband's brother Venkatappayya and the alienees from Venkatappayya of certain joint family properties, for maintenance due to her from the joint family. She prayed that the maintenance that might be decreed to her should be made a charge upon nine specific items of immoveable property mentioned in her plaint. She alleged that items 1 to 8 had been alienated by Venkatappayya to the other defendants in O.S. No. 451 of 1916 fraudulently and collusively with a view to defeat her right of maintenance. She also alleged that those alienations were not *bona fide* nor supported by consideration. She obtained a decree for maintenance on 27th April, 1918, and the same was charged by the decree on all the nine items of immoveable property mentioned in her plaint. Before the decree was passed in O.S. No. 451 of 1916, P.W. 1 (Narasayya) filed a plaint on 27th January, 1916, and obtained a decree for money in Small Cause Suit No. 1906 of 1916 on the file of the same Court against Venkatappayya on a promissory note, and in execution of that decree P.W. 1 brought item 9, specified in O.S. No. 451 of 1916, as one of the properties charged for the widow's maintenance, to sale, and after purchasing the same himself on 8th April, 1918, sold the same to the plaintiff on 2nd June, 1919. In the meantime the widow, Venkatasubbamma, executed the maintenance decree obtained by her (O.S. No. 451 of 1916) and brought item No. 9 mentioned in that decree to sale, and the second defendant Veerayya became the purchaser in Court auction on 5th April, 1922. The 2nd defendant attempted to obtain possession of the said property in pursuance of the sale certificate granted to him in O.S. No. 451 of 1916, and therefore the plaintiff instituted the original suit, out of which this second appeal has arisen, for a declaration that the Court-sale of the property in suit (item No. 9 in O.S. No. 451 of 1916) in favour of the 2nd defendant is not valid and binding on him and for a permanent injunction restraining the 2nd defendant from taking possession of the property in pursuance of the Court-sale to him.

The 1st defendant, the widow Venkatasubbamma, did not appear in this suit. The 2nd defendant pleaded that the purchase by the plaintiff's vendor P.W. 1 in execution of the Small Cause decree on 8th April, 1918, was vitiated by the doctrine of *lis pendens,* since O.S. No. 451 of 1916 instituted by the widow to have the suit item also made a charge in respect of her maintenance was pending at the time, and that conse-

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quently the purchase by P.W. 1 could not prevail over the widow's rights, that the 2nd defendant being the auction purchaser in execution of the maintenance decree, his rights to the property should prevail over the rights of P.W. 1, the plaintiff's assignor.

Three main questions were discussed in the Lower Courts —(*a*) whether the doctrine of *lis pendens* applies to suits for maintenance where a charge is claimed on specified immoveable property; (*b*) whether the doctrine applies to involuntary sales; and (*c*) whether debts binding on the joint family have priority over claims of widows of the joint family for maintenance, and, if so, whether the Court-sale to P.W. 1 would have precedence and priority over the Court-sale to the 2nd defendant in the circumstances.

The Trial Court found that the decree-debt in Small Cause Suit No. 1906 of 1916 was not under the circumstances a binding debt which could have prevailed against the claim for maintenance of the 1st defendant; and on the other two points the Trial Court held that the doctrine of *lis pendens* applied. The suit was accordingly dismissed. On appeal by the plaintiff, the Lower Appellate Court admitted a fresh document in evidence and found that the decree-debt in Small Cause Suit No. 1906 of 1916 was a debt binding on the joint family. The Lower Appellate Court further observed that the doctrine of *lis pendens* applied in the circumstances, and therefore confirmed the Trial Court's decree.

When the second appeal first came for hearing, Mr. Justice Odgers being of opinion that the finding of the Lower Appellate Court on the question of the binding nature of the debt, which was the subject-matter of the Small Cause Suit No. 1906 of 1916, was not satisfactory, called for fresh findings and reserved the other questions of law arising in the case for further consideration. The finding submitted by the Lower Appellate Court (another Subordinate Judge) is to the effect that the debt which was the subject-matter of the Small Cause suit was one binding on the joint family. This finding is one of fact and has to be accepted for the purpose of this second appeal.

Mr. Lakshmanna, the learned advocate for the appellant, argued two questions: (1) that the doctrine of *lis pendens* does not apply to the case; and (2) that debts binding on the family have priority over the claims of a Hindu widow for maintenance, and that on the finding of the Lower Appellate Court that the debt which gave rise to the Small Cause decree was

binding on the family, the purchase by P.W. 1 in Court-sale should prevail over the purchase made by the 2nd defendant.

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On the question of *lis pendens* we are clearly of opinion that the doctrine applies to a suit for maintenance where the plaintiff claims to have maintenance specifically charged on specific items of immoveable properties mentioned in the plaint. In such a case, "a right to immoveable property is directly and substantially in question" within the meaning of section 52 of the Transfer of Property Act, and therefore "the property cannot be transferred or otherwise dealt with by any party of the suit so as to affect the rights of any other party to the suit under any decree which may be made therein". *Dose Thimmanna Bhutta* v. *Krishna Tantri*[2] is a clear and direct decision on this point. There, the learned Judges (Benson and Sankaran Nair, JJ.) held that a "suit in which a widow claims to have her maintenance made a charge on specific immoveable property is one in which a right to such immoveable property is directly and specifically in question within the terms of section 52 of the Transfer of Property Act". See also *Jogendra Chunder Ghose* v. *Fulkumari Dassi*[3] and *Krishna Pattar* v. *Sinnaponnu*[4]. In fact the learned advocate for the appellant did not seriously dispute this point, and we think it is clear that the doctrine of *lis pendens* applies to a suit for maintenance in which the plaintiff claims to have her maintenance made a charge on specific immoveable property mentioned in the plaint and a decree is passed creating a charge on such property.

Mr. Lakshmanna, however, argued that the doctrine of *lis pendens* has no application to cases of involuntary sales. It is however clear to us that the principle of the doctrine of *lis pendens* applies equally to involuntary sales and is not confined to transfers *inter vivos* if the other conditions are satisfied. In *Pethu Aiyar* v. *Sankaranarayana Pillai*[5] Justice Napier observed as follows:

> "It is now beyond dispute that involuntary sales by decree are covered by the mischief of the doctrine,"

though having regard to the provisions of section 2, proviso (*d*), section 52 as such might not apply to such cases. See *Man Singh* v. *Amantaka Prasad*[6] and *Tinoodhan Chatterjee* v.

2. (1906) I.L.R. 29 M. 508: 16 M.L.J. 413.
3. (1899) I.L.R. 27 C. 77.
4. (1914) 25 I.C. 759.
5. (1916) I.L.R. 40 M. 955 at 961: 32 M.L.J. 374.
6. (1914) 26 I.C. 879.

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Trailokhya Charan Sanyal[7]. In *Tinoodhan Chatterjee* v. *Trailokhya Charan Sanyal*[7] the learned Judges held that

"the doctrine of *lis pendens* is applicable to a purchase at an execution sale, and that the question may now be considered as set at rest by decisions of the Privy Council" (page 415).

In Ghose on Mortgages, Volume II, page 706, the learned author remarks that

"the weight of authority is decidedly in favour of the extension of the doctrine to alienations *in invitum;*"

and at page 707 it is stated that in *Nilakant Banerji* v. *Suresh Chandra Mullick*[8] their Lordships of the Privy Council expressed strong doubts as to the correctness of confining the principle to voluntary alienations. And the question may now be taken to be practically concluded by their Lordships' judgment in *Radhamadhub Holdar* v. *Monohur Mukerji*[9] and *Moti Lal* v. *Karrabuldin*[10]. In *Vedachari* v. *Narasimha Mudali*[11] Krishnan and Odgers, JJ., held that the doctrine of *lis pendens* applies to Court-sale also.

The question is discussed in Hukm Chand's Treatise on the law of *res judicata* at pages 713 and 714. The conclusion arrived at is that the weight of authority is in favour of the view that a purchaser at a sale in execution pending a suit is bound by the result in that suit. The inconvenience that would be caused by upholding the opposite view is forcibly pointed out in an elaborate judgment of Sir Richard Couch, C.J., in *Raj Kishen Mookerjee* v. *Radhamadhub Holdar*[12]. See also Bennett on *Lis pendens,* page 328, section 284.

We accordingly overrule the contention raised by the learned advocate for the appellant and hold that the principle of the doctrine of *lis pendens* applies to sales in Court auction also.

The last point raised by the learned advocate for the appellant is really the point that was strongly pressed by him in this second appeal. He argued that debts binding on a joint Hindu family have priority over maintenance of widows, and as the finding of the Lower Appellate Court that the decree in the Small Cause suit was in respect of a debt binding on the joint family has to be accepted, he argued that the claims of the widow, the 1st defendant and of the 2nd defendant, who is

7. (1912) 17 C.W.N. 413.
8. (1885) L.R. 12 I.A. 171: I.L.R. 12 C. 414 (P.C.).
9. (1888) L.R. 15 I.A. 97: I.L.R. 15 C. 756 (P.C.).
10. (1897) L.R. 24 I.A. 170: I.L.R 25 C. 179 (P.C.).
11. (1923) 45 M.L.J. 825.
12. (1874) 21 W.R. 349.

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the auction purchaser in execution of the maintenance decree, could not prevail over the rights of the auction purchaser in execution of the Small Cause Court's decree. He strongly relied on the following observations in *Dose Thimmanna Bhutta* v. *Krishna Tantri*[2] of the learned Judges, Benson and Sankaran Nair, JJ., that

"It is not alleged that, so far as the property in dispute before us is concerned, the mortgage debt due to him was contracted for the purpose of paying off any debt entitled to any priority over the widow's claim for maintenance, or already due by the mortgagor."

He also relied on the observations of Benson and Bhashyam Aiyangar, JJ., in *Jayanti Subbiah* v. *Alamelu Mangamma*[13] to the effect that the debts of a husband take precedence over the widow's claims for maintenance. Some other decisions were also referred to, to the same effect.

Turning to *Dose Thimmanna Bhutta* v. *Krishna Tantri*[2] it is clear that the observations relied on were only *obiter*. The Court as a matter of fact held in that case that the doctrine of *lis pendens* applied, and upheld the widow's claims. Further, it is not mentioned what debts are entitled to any priority over the widow's claim for maintenance and under what provisions of law. Mr. Lakshmanna admitted, and in our view very properly, that the case reported in *Dose Thimmanna Bhutta* v. *Krishna Tantri*[2] is not a decision on this point, and that the observations relied on at page 509 are only *obiter*. The decision in *Jayanti Subbiah* v. *Alamelu Mangamma*[13] does not lay down anything inconsistent with the view we are inclined to adopt. In that case there was no decree obtained by the widow creating a charge in respect of any specific immoveable property of the family; nor was her general claim for maintenance against the joint family estate reduced by any contract between the parties to the form of a specific charge on any specific immoveable properties of the family. In these circumstances, the learned Judges held that an auction purchaser in execution of a money decree binding on the family was entitled to the properties purchased by him, and that the general rights of a Hindu widow under Hindu law could not be put forward to resist the claim of such auction purchaser.

As observed by Mr. Justice West in *Lakshman Ramchandra Joshia* v. *Satyabhamabai*[14]

"The widow's claim being strictly to maintenance and maintenance only, without any defined share in the estate even on partition, and the

2. (1906) I.L.R. 29 M. 508: 16 M.L.J. 413.
13. (1902) I.L.R. 27 M. 45: 12 M.L.J. 270.
14. (1877) I.L.R. 2 B. 494 at 515.

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kind of maintenance even that she can claim being dependent on the perhaps fluctuating circumstances of the joint family, it appears that although she may at her will get her claim recognised as chargeable on the estate in the hands of the co-parceners reduced to certainty, and secured as a specific charge on the estate, . . . yet if she could refrain from that course in the hope of sharing the improving circumstances of the family or through mere carelessness, she leaves to the co-parceners an unlimited estate to deal with at their discretion, and must share their ill as well as their good fortune."

In the absence of fraud, the above passage describes the widow's rights in general, and before her rights are reduced to the form of a charge on any specified family property.

The other decisions cited do not take the case any further. In those cases also there was no specific charge created, either by act of parties or by the decree of Court, over specific items of immoveable property belonging to the family for the maintenance due to the widow. Our attention was also drawn to Trevelyan's Hindu Law, 3rd Edition, page 99, where it is stated as follows:—

"A right of maintenance is not affected by a transfer made during the pendency of a suit for maintenance, unless such transfer be effected for the purpose of paying off a debt, which has priority over the claim for maintenance."

Mulla's Hindu Law, 6th Edition, section 570, page 578, was also relied on, where it is mentioned that

"Debts contracted by a Hindu take precedence over the right of maintenance of his wife or infant child, or his widow after his death. The same is true of debts contracted by the manager of the joint family of which the husband was a member, provided the debts were incurred for the benefit of the family."

The only authority quoted by the learned author, Sir E. J. Trevelyan, is *Dose Thimmanna Bhutta* v. *Krishna Tantri*,[2] about which we have already made our remarks. The passage quoted from Mr. Mulla's book refers, as we understand it, only to cases where the right of maintenance has not been reduced to the form of a specific charge either by private contract or by proceedings taken in Court. That is made clear by the concluding sentence in the same paragraph at page 579:

"But where maintenance has been made a charge upon the property, it takes precedence over the right of a subsequent purchaser of the same property in execution of a money decree, though the decree was in respect of debts binding on the family."

2. (1906) I.L.R. 29 M. 508: 16 M.L.J. 413.

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No doubt in paragraph 572 the learned author quotes the observations already referred to from *Dose Thimmanna Bhutta* v. *Krishna Tantri*[2] to the effect that

"The transferee of immoveable properties pending a suit by a Hindu widow to establish a charge on specific immoveable property for her maintenance must hold the property subject to such charge, unless the transfer be effected for the purpose of paying off a debt which has priority over the widow's claim for maintenance."

In *Somasundaram Chetty* v. *Unnamalai Ammal*[15] it was held by Oldfield and Seshagiri Aiyar, JJ., that

"A charge on joint family properties created by a decree for maintenance payable to the widow of a member of a joint Hindu family takes precedence over the right of a subsequent purchaser of the same properties in execution of a money decree binding on the family."

No objection could be, nor in fact was, taken by the learned advocate for the appellant to the decision in *Somasundaram Chetty* v. *Unnamalai Ammal*[15]. See also *Lakshman Ramchandra Joshia* v. *Satyabhamabai*[14] per West, J., *Kuloda Prosad Chatterjee* v. *Jageshar Koer*[16], *Muttia* v. *Virammal*[17] and *Jamna Bai Ammal* v. *Balakrishna Tawker*[18]. In *Jamna Bai Ammal* v. *Balakrishna Tawker*[18] Mr. Justice Venkatasubba Rao observed that

"(1) Under Hindu Law a widow's claim to maintenance is not a charge upon the estate of her deceased husband until it is fixed and specifically charged upon that estate either by agreement or by decree of Court and does not take precedence over unsecured debts which are binding on the family of her deceased husband; (2) that if the widow's claim has ripened into a specific charge it has priority over the claims of creditors whose rights have not been secured by alienation of property."

The cases in *Sham Lal* v. *Banna*[19] and *Gur Dayal* v. *Kaunsila*[20] were relied on by the learned advocate for the appellant. But in neither of them was there a specific charge created in respect of the maintenance claim. The observation that even if there is a charge it would be subordinated to the claims of the creditor is not (so far as we are aware) supported by any texts of Hindu Law, and no such texts were cited to us. Section 2 of the Transfer of Property Act was also relied on to show that nothing in Chapter II of the Transfer of Property Act (and section 52 forms part of Chapter II) shall be deemed to affect any rule of Hindu Law; but as no rule of Hindu Law has been brought to our notice supporting the appellant's con-

2. (1906) I.L.R. 29 M. 508: 16 M.L.J. 413.
14. (1877) I.L.R. 2 B. 494 at 515.
15. (1920) I.L.R. 43 M. 800: 39 M.L.J. 179.
16. (1899) I.L.R. 27 C. 194.
17. (1877) I.L.R. 10 M. 283 at 288 (F.B.).
18. (1927) 53 M.L.J. 176 at 178. 19. (1882) I.L.R. 4 A. 296 (F.B.).
20. (1883) I.L.R. 5 A. 367.

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tention, we are of opinion that the statement that the debts of a Hindu family take precedence over the claims of Hindu widows for maintenance would apply only so long as the claim for maintenance is not made a charge on any specific property.

In these circumstances, the question arises whether any reason has been shown why the principle of the doctrine of *lis pendens* should not apply to such cases as the one before us. After a decree is passed charging specific items of immoveable property of the joint Hindu family for the maintenance due to the widow, it is clear that the rights of a simple money creditor of the joint family do not take priority over the charge created by the decree,—fraud and collusion apart. Does it make any difference when such money creditor seeks to proceed against immoveable property belonging to the family at a time when a suit by the widow claiming to charge that immoveable property is pending in a Court, if such a decree in her favour is ultimately passed. The very principle of the doctrine of *lis pendens* is to prevent creation of fresh rights with reference to immoveable properties which are the subject of adjudication in suits pending before Courts. After decree, the decree operates, and would protect the decree-holder against any subsequent transferees. One object of the doctrine of *lis pendens* is to prevent the plaintiff's rights and claims to property being prejudiced by delay of Courts in disposing of the suit and to prevent dealing of the property by or at the instance of the defendant to the prejudice of the plaintiff.

The purpose of the rule is to keep the subject-matter of the litigation within the power of the Court until the judgment or decree shall be entered, since otherwise, by successive alienations pending the suit, the judgment or decree could be rendered abortive and impossible of execution. To give effect to the doctrine of *lis pendens,* two things seem to be indispensable:

(1) That the litigation must be about some specific thing which must necessarily be affected by the termination of the suit; and

(2) that the particular property involved in the suit must be so defined in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation.

If the conditions are fulfilled, the plea that the purchase was made *bona fide* and that the purchaser paid a full consideration for it will not avail against such judgment or decree; nor will the purchaser be permitted to prove that he had no

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notice of the suit. The law infers that all persons have notice of proceedings of Courts of record. *See* Black on Judgment, Vol. II, section 550.

The principle of the doctrine of *lis pendens* is explained by the Privy Council in *Faiyaz Husain Khan* v. *Prag Narain*[21]. Lord Macnaghten, after referring to Lord Justice Turner's observations in *Bellamy* v. *Sabine*[22] to the effect that

"it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail"

observed that the correct mode of stating the doctrine, as Cranworth, L.C., observed in the same case, is that

"*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent."

It being clear, and in fact not disputed, that section 52 of the Transfer of Property Act applies to a suit for maintenance where a charge is claimed in respect of specific immoveable property, we are not able to see how the principle of the doctrine of *lis pendens* ceases to be applicable during the period between the date of the plaint and the date of the decree. No specific rule of Hindu Law to the contrary has been quoted to us, and the principle of the doctrine of *lis pendens* must be held to apply, it not being pretended that the rights created in favour of the plaintiff's assignor, P.W. 1, during the pendency of the maintenance suit were under the authority of the Court in which that suit was pending. Where reckless plaints are filed claiming charges upon all immoveable properties belonging to the defendants without any justification whatsoever, and with a view to embarrass the management by the kartha of the family, section 52 empowers the Court to sanction that property which is the subject-matter of the suit might be transferred or otherwise dealt with by any party to the suit on such terms as the Court may impose. If the Court be satisfied that for paying off debts due by the family, the defendant who is the manager of the family should be authorised to sell any of the properties mentioned in the maintenance plaint, then it is open to the Court, if it thinks fit, to sanction the sale or transfer of any such property. Filing of such plaints in Courts should be taken to constitute notice to all persons concerned and unless the money creditor of the family took steps to get sanction of the Court under section 52 of the Transfer of Property Act, it

21. (1907) L.R. 34 I.A. 102: I.L.R. 29 A. 339: 17 M.L.J. 263 (P.C.).
22. (1857) 1 D. & J. 566.

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would seem to logically follow that any transfer of the property mentioned in the maintenance plaint could not affect the plaintiff, in case she got a decree charging that very property.

Our attention was not drawn to any direct decision on the point we have to decide. There is, however, an observation of Justice Phillips in the case reported in *Rajah of Kalahasti* v. *Venkatappa Nayanim Bahadur Varu*[23]. At page 550 it is observed as follows:—

"Under her husband's will the widow obtained no specific charge on the estate and could only claim the allowance as a legatee or as a Hindu widow, but from the date of her suit, namely, 22nd March, 1897, she became entitled to a charge for her allowance by virtue of the decree, dated 22nd August, 1900, which must be deemed to refer back her right to the date of her plaint. As these appeals are concerned mainly with the relative priority of Lakshmikantamma's claim and the claims of the several appellants, it is important to remember that the widow's claim dates back to 22nd March, 1897, and any mortgages or charges created after that date would not affect her right."

No doubt the question is not discussed by the learned Judge, but the observation of the learned Judge is in accordance with the view we are inclined to take for the reasons already mentioned by us.

Our attention was drawn to the decision of a learned Judge of this Court in the case reported in *Rattamma* v. *Seshachalam Sarma*[24] where he held that a charge takes effect only from the date of the decree. If the learned Judge intended to lay down that even in cases where a plaint prays for specific charge on specific immoveable properties mentioned in it, a charge could take effect only from the date of the decree, and not from the date of the suit, then, with all respect, we are unable to agree with him. No doubt in cases where no charge is claimed on any specific immoveable property, but only a general claim is made against the defendant (manager) and the joint family property generally, without specifying in the plaint any property, then, in such cases, a decree creating a charge on any specific immoveable property would take effect ordinarily only from the date of the decree; but the case would be different when the plaint claims a charge on specific immoveable property and the decree also grants such prayer and charges such specific property. See in this connection Mayne's Hindu Law, Section 462, where the learned author states as follows:—

"Where a widow had sued for maintenance and had named specific pieces of property in order to show the amount she was entitled to, but had made no claim for a charge on the property, but such a charge was in fact created by the decree, the charge was held not to be binding as

23. (1928) 27 L.W. 544. 24. (1926) 52 M.L.J. 520.

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against a mortgage made pending suit, by virtue of the doctrine of *lis pendens*. It would have been different if the suit had been to obtain a charge."

A somewhat similar question has arisen in England and America. The general principles of the doctrine of *lis pendens* being the same there as in India, we think, it is perhaps permissible to refer to analogous cases decided in those countries. It has there been held that

"If in a suit for alimony, relief is sought in respect of specific property; either by making it chargeable with the payment of alimony, or setting it apart for the use of or as the property of one of the parties, or of partitioning or dividing it between them, the doctrine of *lis pendens* will apply"—(see page 723, Hukm Chand's Treatise on *Res Judicata*).

In *Ulrich* v. *Ulrich*,[25] the suit was for maintenance, yet the Supreme Court held the rule of *lis pendens* to apply, as a certain lot was described in the bill, and it was alleged that the lot constituted the principal property of the defendant out of which the alimony should be decreed. In *Wilkinson* v. *Elliot*[26] the suit was for divorce and alimony from certain property specifically described, and it was contended that the doctrine had no application in such suits, but Johnston, J., held

"If a divorce is asked on account of the fault of the husband, the wife may ask not only that all her own land may be restored to her that has not been disposed of, but may describe particular property belonging to the husband, and ask that the same may be set apart for her as permanent alimony. When this is done, the property is made the subject-matter of litigation, and is brought within the jurisdiction of the Court, and any one who purchases the same should be bound by the judgment or decree thereafter rendered. If in such an action there was no specific property pointed out, but only a general prayer for alimony, the doctrine would not apply, for the reason that the alimony might be awarded out of either real or personal property; and as no particular property was described and made the subject-matter of the litigation, no one could have noticed that any particular property was involved."

Again, in *Powell* v. *Campbell*[27] it was observed that

"In many cases where, in divorce proceedings, the application is for alimony proper, that is, an allowance to be paid at regular periods for the wife's support, it was held that the rule of *lis pendens* does not apply where the suit is *in personam*, and did not relate to any specific part of the personal or real estate of the husband. If, however, the wife in her complaint specifically describes property which she asks the Court to decree to her for her support, there seems to be no well-founded reason why the rule of *lis pendens* should not apply . . . . In such a case, a purchaser *pendente lite* with notice of the suit and its objects knows that the property described may be decreed to the wife, and that one of the objects of the suit is to obtain a decree awarding such property to her (*see*

25. 3 Mackey. 290. 26. 19 Am. St. Rep. 158.
27. 19 Am. St. Rep. 350.

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section 284 of Hukm Chand's *Law of Res Judicata,* pages 723 at 724 and Bennett on *Lis Pendens,* page 267, section 219).

The conclusion would seem to be that if the prayer in the bill be for alimony out of her husband's general estate, then the doctrine of *lis pendens* would not apply; but if the prayer be for alimony to be assigned to the wife out of any specific property of the husband mentioned in the bill or petition, then the rule of *lis pendens* would apply. The discussion is interesting, and throws light on the applicability of the doctrine of *lis pendens* to cases like the one before the Court.

For the above reasons, we hold that section 52 of the Transfer of Property Act applies to a suit by a Hindu widow in which she claims to have her maintenance charged on specific items of immoveable property mentioned in the plaint; that the principle of the doctrine of *lis pendens* applies to sales *in invitum* that take place during the pendency of such suits; that a decree obtained by the plaintiff in such a suit creating a specific charge over specific items of immoveable property mentioned in the plaint operates to give her a charge as from the date of the plaint, and not as from the date of the decree only, unless there be anything in the decree to the contrary; that without the sanction of the Court, transfers *inter vivos* or sales *in invitum* during the pendency of such suit could not prevail over such charge claimed in the plaint and granted by the decree; that a simple money creditor of a joint Hindu family has no priority over such charge granted by the decree, in the absence of fraud or collusion, and an auction purchaser, during the pendency of such maintenance suit, of an item of property over which a charge was claimed in the plaint and was granted by the decree who purchased in execution of a simple money decree binding on the family, is not entitled to priority over another auction purchaser of such property in proceedings taken to execute such maintenance decree.

We would accordingly dismiss the second appeal with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

F. H. Wilson, Official Assignee, High Court, Madras and another .. *Appellants** (*Defts.*)

v.

Nathmull .. *Respondent* (*Plff.*).

Official Assignee, Madras *v.* Nathmull.

Civil Procedure Code (V of 1908), S. 80—Wrongful seizure of goods by the Official Assignee on the mistaken belief that they belonged to the insolvent—Suit against Official Assignee—Notice of suit, whether necessary.

Where the Official Assignee was honestly mistaken in believing certain goods to belong solely to an insolvent and seized them and he was sued for such wrongful act without due notice under S. 80 of the Civil Procedure Code,

Held, that the Official Assignee was acting in his official capacity and was entitled to notice under S. 80 of the Civil Procedure Code.

Per *Ramesam, J.*—It is more a question of fact with reference to the surrounding circumstances and with reference to the ordinary duties of the official, and not whether every part of his conduct is strictly according to law.

Koti Reddi v. *Subbiah,* (1918) I.L.R. 41 M. 792: 34 M.L.J. 494 (F.B.), *Dakshina Ranjan Ghosh* v. *Omar Chand Oswal,* (1923) I.L.R. 50 Cal. 992, *Abdul Rahim* v. *Abdul Rahman,* (1924) I.L.R. 46 A. 884 and *Joosub Haji Alli* v. *Kemp,* (1902) I.L.R. 26 Bom. 809, followed.

On appeal from the judgment of the Honourable Mr. Justice Beasley, dated 15th December, 1927, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 543 of 1926.

K. S. Krishnaswami Aiyangar for appellants.

Nugent Grant for respondent.

JUDGMENTS. *Ramesam, J.*—This appeal arises out of a suit, C.S. No. 543 of 1926, on the Original Side filed by the respondent Nathmull originally against three defendants. Later on the suit proceeded against defendants 1 and 3 only. A decree was given against those defendants by the learned Trial Judge, and defendants 1 and 3 are the appellants before us. Ramesam, J.

The facts out of which the suit arose may be shortly stated as follows:—The 3rd defendant Meghraj Sowcar and his partner Surajmull Sowcar filed a suit against Chunilal Omaidmull Sowcar and another for dissolution of partnership, for taking of accounts and for recovery of a certain sum of money—C.S. No. 261 of 1923. On the 17th of September the suit was decreed by our brother, Waller, J. The plaintiffs applied on the 24th of September, 1924, for attachment of the defend-

*O.S.A. No. 16 of 1928. 8th November, 1929.

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ants' interests in the business of Nathmull and Chunilal which had been carried on at No. 99, D'Mellows Road, Choolai, Madras and for the appointment of a Commissioner to take an inventory of articles, jewels and cloths, vessels, etc., pledged with the 1st defendant and to be found in the same premises and to initial the books of account. On the same day notice was ordered and one Mr. C. Devarajan was appointed Commissioner. On the 25th of September the defendants were ordered to admit the Commissioner for the purpose of initialling the accounts and taking an inventory. On the 14th of October notice to Nathmull and Chunilal was ordered. On the 17th Nathmull's counsel asked for time. Meanwhile on the 7th of October Chunilal was declared insolvent and on the 22nd of October the matter having become known to the appellants the application of 24th September was not pressed. The order on that day contained the note, "The question of alleged partnership with Nathmull is left open." In the affidavit accompanying the application of the 24th of September, 1924 it was stated that the business in Nos. 98 and 99, D'Mellows Road, was carried on under the name and style of Nathmull Chunilal. The petitioner's case was that Chunilal was the sole proprietor. The Commissioner made a report on the same date that when he went to the premises he found a piece of paper affixed on the door bearing an inscription.

"To

Kasthurichand Nathmull Sowcar,

95, *D'Mellows Road, Perambore Barracks.*"

He also states in his report that neither the defendant Chunilal nor Nathmull's brother Mothichand would give the keys of the premises and they also refused to produce the account books. After the adjudication of Chunilal his property vested in the Official Assignee and Meghraj moved the Official Assignee for taking steps to reduce to his possession the property of Chunilal. Accordingly on the 2nd of November the Official Assignee sent his searcher Kuppuswami with Meghraj to the premises in question. He addressed a letter Exhibit B to the insolvent Chunilal in which he requested the addressee to permit the searcher along with Meghraj to take an inventory of all the articles in the house. The letter then says:

"Should you raise any objection whatsoever, he is authorised to bring in Police assistance."

On the 2nd of November the searcher and Meghraj went to the shop, Nos. 98 and 99, D'Mellows Road. The evidence

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shows that a policeman was also taken who was standing on the verandah. Meghraj also was standing aside. There was at first some oral protest but ultimately, probably, on account of the presence of the policeman, without any disturbance the account books in the shop were removed and the shop was sealed. The list of account books is Exhibit B-1. It contains a note that Nathmull claimed these books. The Official Assignee immediately applied to the Court for an order to attach the goods in the premises on the ground that the business carried on in those premises was the business of the insolvent himself. That is, he practically adopted the case of Meghraj when he applied for attachment in C.S. No. 261 of 1923. Nathmull himself also applied by petition No. 355 of 1924 for a declaration that the goods belonged solely to him and not to the insolvent. The petition is Ex. I and the affidavit accompanying the said petition is Exhibit I-A. These two petitions came on for orders before Srinivasa Aiyangar, J. His judgment in the said matter is Exhibit I-B and the order is Exhibit B-3. As is seen from the above narration of facts the case of the Official Assignee before Srinivasa Aiyangar, J., was that the goods solely belonged to the insolvent and Nathmull's case was that the goods in the shop belonged solely to himself. There is, of course, an intermediate case possible that the shop belonged to a partnership consisting of Nathmull and Chunilal and not wholly to Nathmull, nor wholly to Chunilal. This case of partnership was suggested before Waller, J., as the note in the order, dated the 22nd October, 1910, shows; but who alleged it is not clear. Before Srinivasa Aiyangar, J., the burden of proof was placed on the Official Assignee (*vide* note dated the 23rd of February, 1925) and the learned Judge in his judgment says that he was not considering any question as to whether Chunilal had any interest in the business short of total ownership. The only question he considered was whether Chunilal was the sole proprietor of the shop or not. On this matter he found against the Official Assignee; that is, he found that Chunilal was not the sole proprietor of the shop. This finding, of course, does not mean that Nathmull was the sole proprietor of the shop, for the finding that Chunilal was not the sole proprietor is consistent with Chunilal and Nathmull being partners in the shop. But this possible alternative case was not considered by the learned Judge. On his finding Chunilal was not the sole proprietor it followed that Nathmull had either a partial interest or sole proprietorship in the shop and, therefore, he directed that the

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goods should be delivered to Nathmull. The order Exhibit B-3 is worded as follows:—

"It is declared that the properties attached and sealed by the Official Assignee at premises Nos. 98 and 99, D'Mellows Road, Choolai, Madras, belong to the said Nathmull and not to the insolvent herein and it is ordered as follows:—

(*i*) that the application, taken out by the said Official Assignee do stand dismissed out of this Court; . . . " etc.

If this order is read solely by itself and without the light afforded by the judgment it certainly means that it was declared that the goods belonged solely to Nathmull; but it is equally clear from the judgment that the learned Judge never decided such a thing. If it is impossible to construe the decree consistently with the judgment, it would be a matter for the amendment of the decree and if it is a matter of any importance to set the matters right, we would adjourn the appeal to enable the appellants to apply for amendment of the decree, and, if the amendment is refused, to file an appeal against such order refusing amendment and such appeal and this appeal might be posted together. But it is possible to construe the decree in the light of the judgment and whenever it is possible to read the decree in two ways, one way consistent with the judgment and the other inconsistent with it, it is our duty to construe it in a way consistent with the judgment. Though read by itself the order implied that the goods solely belonged to Nathmull we think that the proper construction of the order is that the goods belonged at least to some extent if not wholly to Nathmull also but are not the sole property of the insolvent. This matter does not seem to be of great importance now, though before the learned Judge this was one of the points very much debated. The defendants sought to cross-examine the plaintiff for the purpose of showing that Nathmull and Chunilal were at least partners in the shop. But the learned Trial Judge holding that the order of Srinivasa Aiyangar, J., constituted the matter *res judicata* disallowed such cross-examination and would not permit the defendants to adduce further evidence. It seems to us that in the way we construe the order in the light of the judgment the matter is not *res judicata* and that the evidence of the defendants to show that Nathmull and Chunilal were partners ought not to have been shut out. But even then it is doubtful whether the Official Assignee could have directly removed the goods from the shop or sealed the premises. The present action is filed for damages for trespass by stealing the premises and by the removal of the account books. Under the English law

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the bankruptcy of one of the partners seems to put an end to the partnership (*vide* Lindley, p. 800), but under the Indian law this does not seem to be the case. The bankruptcy affords a ground for the other partners to go to Court and obtain a dissolution, *vide* section 254 (2) of the Contract Act. Under section 98 of the Presidency Town's Insolvency Act the Court may authorise the Official Assignee to continue or commence any suit or proceeding in his name and that of the insolvent's partner and any release by the partner is void. But it does not appear that the Official Assignee can take possession of the goods of the partnership without the consent of the other partner or partners in whose possession they may happen to be. Still one would have thought that if the insolvent was a partner in the shop the action of the Official Assignee and Meghraj had more justification than if the business belonged wholly to Nathmull and Chunilal had no interest in it at all. Except from this point of view, namely whether the action of the Official Assignee may be more wrongful in one case than in another, the question of the interpretation of Srinivasa Aiyangar, J.'s order does not seem to be of any importance.

The appeal of the Official Assignee was argued on two grounds: (1) that notice under section 80 of the Code of Civil Procedure was necessary before suing, and (2) that the plaintiff abandoned his claim for damages for what the Official Assignee did on the 3rd of November, 1924. To support this case of abandonment Exhibits II and II-A were relied on. Exhibit II was the petition and Exhibit II-A was an affidavit filed along with it. The petition was for leave to sue the Official Assignee for certain action taken by him on the 18th of May, 1926, the Official Assignee on that occasion being Mr. Albuquerque, the 2nd defendant in the present suit. This application was dismissed on the ground that no leave of the Court was necessary before the suit is filed, and in the affidavit it was stated in paragraph 9 referring to the incidents of the 3rd of November, 1924,

> "I was advised in the circumstances by my counsel not to press for damages and, therefore, I gave up my claim for damages."

The petition No. 355 of 1924 not only contained a prayer for declaration that the goods belonged to Nathmull but also a claim for damages. At the time of the argument the counsel thought that no claim for damages for trespass can be properly made before the Insolvency Court and therefore it was not pressed and we think this is all what was meant by paragraph 9

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of the affidavit. Mr. Krishnaswami Aiyangar, the learned advocate for the appellant, relied on section 86 of the Act and argued that the claim for damages can be made before the Insolvency Court and having been made and withdrawn the present suit does not lie. But it seems to us that section 86 cannot relate to claim for damages. It relates only to the validity of any act or decision of the Official Assignee. On appeal under section 86 the Court can set aside any such decision or act. The words "as it thinks just" merely refer to any incidental or consequential order necessary for giving effect to the rest of the order but cannot refer to a claim for damages for wrongful trespass to goods. The Insolvency Court has no jurisdiction to entertain a claim for damages and when the plaintiff resolved not to press the claim before Srinivasa Aiyangar, J., he was not withdrawing any claim which was cognizable by the Insolvency Court; nor can it be said that he gave up his claim for damages for all time. All that he meant by paragraph 9 was that he did not press his claim at that stage. This argument of the learned advocate for the appellant therefore fails.

We now come to the second ground, namely, that notice is necessary. A number of English cases were cited before us. It seems to me that most of these cases are not of any help in the present case. Some of them related to the question whether a public officer was protected from being held responsible for his acts under the Public Authorities Protection Act or similar enactments and not to the question whether notice was necessary. One of the decisions, namely, *Selmes* v. *Judge*,[1] related to the question whether notice of action was necessary. The question there arose under 5 and 6 Wm. 4, c. 50, section 109, which ran as follows:—

"No action or suit shall be commenced against any person for anything done in pursuance of, or under the authority of this Act, until twenty-one days' notice has been given thereof in writing. . . . ".

There notice was necessary for a suit in respect of anything done "in pursuance of or under the authority of this Act." Still Blackburn, J., and two other Judges held that the defendant was entitled to notice.

Blackburn, J., said:

"I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute."

He then proceeds to observe that in that case there was nothing to show that the defendants when they made the rate in

1. (1871) L.R. 6 Q.B.C. 724.

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question knew that it was not allowed by the statute under which they were appointed. He then observed:

"The only illegal act done by the defendants was to make an informal rate; they proceeded to collect it, and received from the plaintiff the amount assessed upon him; in these transactions it is clear that the defendants intended to act according to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention. Neither in *Hermann* v. *Seneschal*[2] nor in *Roberts* v. *Orchard*[3] was it decided that a defendant would not be entitled to notice of action, because he had been mistaken in the law. In *Hardwick* v. *Moss*[4] surveyors had obstructed a highway without any statutory authority, but the Court of Exchequer held that as they intended to act pursuant to the Highway Act, they were entitled to notice of action."

This decision and the last decision quoted in it show that, even where public officers were not acting strictly according to the statute, provided they intended to act according to the duties of their office and provided they did not know that they were committing a mistake, they would be entitled to notice even if they were really acting somewhat illegally. It is unnecessary to discuss the question whether the Official Assignee knew that he had no power to seize the goods of a partnership when only one of the partners had become an insolvent; for it is clear that when the Official Assignee was moved in the matter he acted on the supposition that the goods in the shop belonged solely to Chunilal though the business was carried on in the name of Nathmull and Chunilal. In fact the case of Meghraj in C.S. No. 261 of 1923 and the Official Assignee at that time was that Nathmull was brought in merely as a cloak to shield Chunilal from the creditors. In the deposition of Nathmull before the Trial Judge it is admitted that Chunilal was carrying on business in the premises Nos. 98 and 99 up to the 15th of December, 1923, and it is only from the beginning of 1924 that Nathmull who was previously carrying on business at No. 95, D'Mellows Road, began to carry on business also at No. 99. The business at one place was looked after by Chunilal and at the other place by a partner named Rajmal. It is also admitted that in 1924 he got income-tax notice and that it was sent in the name of Nathmull Chunilal. Practically he never took any steps to get the notice corrected. It is also admitted that he sent certain jewels pledged with him by one Chengayya Naidu for sale and these jewels were sold under instructions from a firm called Nathmull Chunilal. He also admits that at the end of September, 1924, his business was being carried on

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2. (1862) 13 C.B. (N.S.) 392.
3. (1863) 2 H. & C. 769: 33 L.J. (Ex.) 65.
4. (1861) 7 H. & N. 136: 31 L.J. (Ex.) 207.

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in the name of Chunilal Nathmull. He says that he protested against his name being used but did not dispense with Chunilal's services. The whole of this part of Nathmull's cross-examination shows that the plaintiff is not a man to be trusted, that certainly the business in the shop did not solely belong to him, that Chunilal had a good deal of interest in the business, that either he and Chunilal were partners or that the business wholly belonged to Chunilal and that Nathmull was lending his own name to shield him from creditors. The latter alternative, it is true, was ruled out by the judgment of Srinivasa Aiyangar, J., but there is a very strong suspicion that the plaintiff was colluding with Chunilal in some manner for the purpose of shielding him from the creditors. To what extent the collusion has gone it is difficult to say. There is a strong suspicion that the whole business is Chunilal's, Nathmull merely associating his name for the purpose of shielding him; but even if this surmise is not correct, at least both were partners and Chunilal had some interest in the business and certainly the case of Nathmull that he is the sole proprietor is absolutely false. However, as I have already said, the Official Assignee thought that the goods belonged solely to Chunilal. When he wrote the letter Exhibit B and when he sent his searcher he simply intended to exercise the powers given to him under section 58 of taking possession of the insolvent's properties. But it is said that a policeman was brought and this at least constituted a show of force. This may be so. It may be that because of the policeman the searcher got possession of the account books easily; but it is also clear that there was no disturbance and no force was used. When Nathmull was asked "What do you mean by forcibly?" he said "I mean that though I protested that the shop belonged to me and that the property in the shop was also mine, in spite of it they did not believe me and they sealed the shop". This answer shows that no actual force was used. There might have been some oral protest. Now it is contended by Mr. Grant that the powers of the Official Assignee are merely those of receivers and receivers have no power of dispossessing forcibly persons in possession, that if they find any resistance in taking possession, they ought to apply to the Court for a warrant under section 59 of the Act and the Court may grant a warrant to any officer of the Court or a police officer and that it is not the business of the Official Assignee to seize the goods. It is true that when the Official Assignee apprehends any serious resistance he may seek

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the help of the Court under section 59 and under that section the Court issues warrants to any officer of the Court or any police officer and not to the Official Assignee. But section 59 does not involve any prohibition to the Official Assignee to obtain possession in any manner he likes. It is only an enabling section and not a prohibiting section. Nor does clause 2 of section 58 prohibit the Official Assignee from taking a police officer as a protection for himself in obtaining possession of insolvent's goods. I do not think it can be said that a receiver can never take a police officer with him in the course of his duties. The distinction drawn by Mr. Grant between taking possession of goods and seizing goods is rather subtle. In either case certainly the Official Assignee is taking possession. If he forcibly seizes the goods he may take the risk of getting into trouble and it may be prudent for him to obtain possession through Court under section 59. But all this is different from saying that he can never seize the goods and he ought not to be accompanied by a policeman to overawe any resistance in obtaining possession. In the present case, no force was actually used. The presence of the policeman avoided any disturbance and the possession of the goods was obtained practically in a peaceful manner. I do not mean to say by this last observation that the Official Assignee is immune for liability for it turns out that he is not entitled to take possession of the goods found not to belong solely to Chunilal. It may, therefore, be that he is liable for some damages. But to say that he is liable is one matter and to say that he was not acting as Official Assignee is another. In my opinion, even if it turned out ultimately that he was not acting strictly legally in taking possession of the goods which he believed to belong to Chunilal but which did not really belong to him, he was certainly purporting to act as Official Assignee within the meaning of section 80 of the Civil Procedure Code. I am unable to agree with the view taken by the learned Trial Judge that

"it is only if the acts done by a public officer are acts which that public officer is in law entitled to do that he can be said to be acting or purporting to act as such public officer; he cannot do or purport to do an act which the statute which casts upon him certain duties and defines such duties does not enable him in that capacity to do."

So far as the acts done in a public capacity are concerned, it may be that the acts should be strictly according to law. But as to acts purporting to be done in a judicial capacity to say that they should be strictly according to law is to make the word "purporting" nugatory. It seems to me that the decision in

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Selmes v. *Judge*[1] and the cases cited in it are inconsistent with such a view. The word "purporting" means intending to seem. This almost implies that, though it is a case of not being strictly according to law, one may still intend it to appear as if it is according to law. Vide *Koti Reddi* v. *Subbiah*[5], *Abdul Rahim* v. *Abdul Rahman*[6] and *Dakshina Ranjan Ghosh* v. *Omar Chand Oswal.*[7] The first of these is a decision of a Full Bench. The Village Munsif's act in that case was apparently according to practice and was one which he would ordinarily do, but in that particular case it was wrongful for he paid the balance of the sale proceeds to the owner though there was an attachment. He did it *mala fide*. The learned Judges held that the *mala fides* had nothing to do with the case and he was entitled to notice. Wallis, C.J., observed that the words "purporting to be done" are wider than "done or intended to be done" under the provisions of this Act in section 264 of the Public Health Act and that they also include "acts intended to seem to be done in his official capacity." This last observation shows that even where an act is not strictly according to law section 80 may apply. The following observations of Sadasiva Aiyar, J., at page 811 support the same view:

"In the present case, the appellant's act in paying over the balance of the revenue sale-proceeds to the defaulter was an act falling within the ordinary duties of his office as Village Munsif and he clearly professed to do it in execution of that duty and it would be quite reasonable on the part of an ordinary third person who becomes aware of the Village Munsif's act in so returning the balance to the defaulter to receive the impression that the act was done by the Village Munsif in his official capacity."

In the present case, it is the ordinary duty of the Official Assignee to take possession of the insolvent's goods. When he proceeds to the shop, removes the account books and seals the premises, it is quite reasonable on the part of an ordinary person to receive the impression that the act was done by the Official Assignee in his official capacity and the Official Assignee is himself professing to do it in the execution of his duties. Though the whole thing turns out to be wrongful because the goods did not solely belong to the insolvent, wherever the Official Assignee is honestly mistaken and takes goods not belonging to the insolvent in the belief that they belong to him, he is certainly acting in his official capacity. A simple case of that kind is *Joosub Haji* v. *N. W. Kemp.*[8] In that case the

1. (1871) L.R. 6 Q.B.C. 724.
5. (1918) I.L.R. 41 M. 792: 34 M.L.J. 494 (F.B.).
6. (1924) I.L.R. 46 A. 884.
7. (1923) I.L.R. 50 C. 992.
8. (1902) I.L.R. 26 B. 809.

timber taken possession of belonged to a third person and not to the insolvent. It was held that notice was necessary. In *Abdul Rahim* v. *Abdul Rahman*[6] a police officer entered a person's name in the history sheet and it was held that S. 80 applied. That was a case of an act which is in the ordinary duty of the official though in the particular case he did it with improper motive. In *Dakshina Ranjan Ghosh* v. *Omar Chand Oswal*[7] a police officer arrested a person whom he knew to be innocent. He also extorted some money. It was held that so far as the first act was concerned notice was necessary but not as to the second. I agree with these decisions. I admit that it is very difficult to describe in abstract language where exactly to draw the line. But I should say that in the practical application I should scarcely feel any difficulty. It is more a question of fact with reference to the surrounding circumstances and with reference to the ordinary duties of the official and not whether every part of his conduct is strictly according to law. In my opinion the Official Assignee was acting in his official capacity and he was entitled to notice under S. 80. The suit, so far as he is concerned, is not maintainable. The appeal must be allowed and the suit dismissed with costs throughout as against him.

We now come to the case of the 3rd defendant. It is true he is a creditor who was instructing the Official Assignee and moving him to take the account books. He certainly believed that the goods in the shop belonged to Chunilal, but this belief does not save him from liability if as a matter of fact he is guilty of any trespass. But the person who actually committed trespass is the searcher of the Official Assignee. The evidence shows that Meghraj merely stood by and took no part in the proceedings. Of course he pointed out the shop to the searcher leaving to the Official Assignee and his subordinates to carry on the proceeding whether it amounted to trespass or not. The person who actually trespassed is certainly the Official Assignee's assistant and he would be certainly formally liable, provided the action was brought in the proper form. But I do not see how Meghraj is liable for the trespass. Inducing a person to trespass is scarcely a ground of action. There is no analogy between such an act and abetment under the criminal law, nor does the principle of procuring a breach of contract extend to other torts. The result is that Meghraj cannot be held liable for moving the Official Assignee, himself

6. (1924) L.R. 46 A. 884.

7. (1923) I.L.R. 50 C. 992.

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not having committed any trespass to goods or premises. The appeal is, therefore, also allowed against him and the suit is dismissed with costs throughout. We certify for two counsels. It is agreed that, in appeal, the costs will be taken by the Official Assignee.

Cornish, J.

Cornish, J.—I have come to the same conclusion. In my opinion the forcible entry by the Official Assignee into the plaintiff's premises without a warrant under S. 59, Insolvency Act, was a tortious act. But I do not think it follows that, because the Insolvency Act does not sanction what the Official Assignee did, his act cannot be regarded as purporting to be done by him in his official capacity.

The principle to be derived from the reported cases on the subject appears to be, that if the act of the officer is one which was ostensibly done by him in the performance of his duties, the act will be deemed as purporting to be done by him in his official capacity, even though he has acted *mala fide*. This is the test applied by Sir John Wallis, C.J., in *Koti Reddi* v. *Subbiah*[5] in the case where a Village Munsif, knowing that the debtor's property had been attached by the plaintiff, fraudulently paid to the debtor the balance of moneys realized from the sale of his property under a distraint for revenue. At page 809 Sir John Wallis said:

"In the present case there were facts justifying the Village Munsif in acting in his official capacity, and there was no occasion for him to resort to the defence that he *bona fide*, though erroneously, believed in the existence of such facts."

Similarly in *Dakshina Ranjan Ghosh* v. *Omar Chand Oswal,*[7] where the question arose out of the act of a police officer in making a wrongful arrest, Sir L. Sanderson, C.J., holding that the suit for false imprisonment brought by the aggrieved party was not maintainable without the notice required by S. 80, Civil Procedure Code, observed (p. 999):

"On the facts of this case there is no doubt that the defendant was a public officer, and on the facts which I have already stated, in my opinion, there is equally no doubt that the act, namely, the arrest of the plaintiff, was an act purporting to be done by the defendant in his official capacity."

The same test was applied in *Abdul Rahim* v. *Abdul Rahman*[6] and in *Joosub Haji* v. *N. W. Kemp,*[8] where it seems to have been assumed that the act of the Official Assignee in seizing somebody else's property in mistake for the insolvent's property was an act purporting to be done by him in his official capacity,

5. (1918) I.L.R. 41 M. 792: 34 M.L.J. 494 (F.B.).
6. (1924) I.L.R. 46 A. 884.
7. (1923) I.L.R. 50 C. 992.
8. (1902) I.L.R. 26 B. 809.

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for there was no argument on the point. On the other hand, this test would clearly not cover such acts as the act of the police officer in *Narayan Hari* v. *Yeshwant Raoji* and *Dattatraya Ramchandra* v. *Annappa Pandurang*[9] in assaulting a person in his custody, the reason being that it cannot be regarded as coming within the functions of a public officer that he should commit an offence under the Penal Code.

Applying these considerations to the facts before us it appears to me that what was done by the Official Assignee falls within the test laid down in *Koti Reddi* v. *Subbiah*[5] and *Dakshina Ranjan Ghosh* v. *Omar Chand Oswal*[7]. Admittedly the Official Assignee took away the account books and sealed up the shop of the plaintiff intending as Assignee of the insolvent Chunilal's estate to take possession of Chunilal's property. The plaint makes no suggestion to the contrary. It is equally indisputable that the act of the Official Assignee in writing the letter (Exhibit B) threatening the insolvent that police assistance would be called in if the searcher was obstructed, and the calling in of a policeman by the searcher when admission was refused to him, had no other purpose than to ensure the searcher's performance of his duties without obstruction or molestation. I think it very probable that when the Official Assignee wrote Exhibit B he did not appreciate that if the threat were put into force it might involve him in an action for trespass. However that may be, I do not see how the circumstances of a trespass resulting from what the Official Assignee did, can make his act any the less an act purporting to be done in his official capacity. For these reasons I think that the failure of the plaintiff to give the required notice is fatal to his suit and that his suit must be dismissed.

With regard to the case against the other defendant, Meghraj, I agree with what has been said by my learned brother in his judgment.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE PAKENHAM WALSH.

The Imperial Bank of India .. *Appellant** (*Plff.*)

v.

V. P. Avanasi Chettiar .. *Respondent* (*Deft.*).

The Imperial Bank of India v. Avanasi Chettiar.

Indian Contract Act (IX of 1872), S. 143—Surety—Liability of—Non-

*Appeal No. 87 of 1926. 29th October, 1929.

5. (1918) I.L.R. 41 M. 792: 34 M.L.J. 494 (F.B.).
7. (1923) I.L.R. 50 C. 992. 9. (1928) I.L.R. 52 B. 832 (F.B.).

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disclosure of facts by the creditor—How far would vitiate a contract of indemnity—Payment by a promissory note only operates by way of conditional discharge—Presumption.

A bank, on the guarantee of the defendant, consented to put through a transaction with a certain firm which required overdraft to the extent of Rs. 10,000. At the date of the guarantee letter a sum of Rs. 5,000 was due to the bank by the indemnified firm. The main question that arose was whether a non-disclosure by the bank of the fact of a past indebtedness of the firm would vitiate the contract of indemnity under S. 143 of the Indian Contract Act.

Held, that the balance of authority was clearly in favour of the view that where a person stood surety for another as regards an advance to be made by a bank, the bank was under no obligation to disclose any past indebtedness existing at the date of the contract of suretyship and that it was a matter which the person standing as surety had to inform himself. If, of course, he wanted information and the bank gave wrong information it might vitiate the contract of suretyship.

Case-law discussed.

Held also that if the surety was liable, he was liable also for the amount of promissory notes accepted as conditional payments by the bank and which were dishonoured.

Where for reducing a liability a promissory note is given, the presumption is that it operates only as a conditional discharge.

Palaniappa Chetty v. *Arunachellam Chetty,* (1911) 21 M.L.J. 432 and *Jambu Chetty* v. *Palaniappa Chettiar,* (1902) I.L.R. 26 M. 526: 13 M.L.J. 252, followed.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in O.S. No. 31 of 1924.

S. Doraiswami Aiyar instructed by *Messrs. Morseby & Co.* for appellant.

K. P. M. Menon for respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. This appeal arises out of a suit filed by the plaintiff to recover Rs. 10,053-1-0 with further interest and costs claimed to be due in respect of a guarantee by the defendant guaranteeing payment of the sums that may be due by a firm which carried on business in the name of N. Nanchappa Chettiar. It is stated in the plaint that one N. Nanchappa Chettiar and two others, N. Krishnappa Chettiar and T. N. Krishnappa Chettiar, were carrying on business in partnership under the name and style of N. Nanchappa Chettiar at Olavakkod, that this firm required an overdraft to the extent of Rs. 10,000 and that this transaction was put through by the Bank on the guarantee of the defendant. The form that the guarantee took was the execution of a promissory note in favour of the firm by the defendant for Rs. 10,000 on the 15th March, 1923, the endorsement of the note to the Bank and the passing of a letter on the same date in which the terms of the guarantee are set out.

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[Their Lordships set out the contentions of the parties, discussed the evidence and continued.]

The first question is whether in respect of these three promissory notes the Bank was entitled to make an entry in the current account debiting the amount when the bills were dishonoured. There can be little doubt that these notes were endorsed over to the Bank in order that credit may be given in the account for the amount of the bills and the Bank took them upon the expectation that the monies would be paid by Govindan Nair. When they were not paid the Bank had a right to make the entries. It is not suggested that the Bank treated them as complete discharge. The general presumption is that a promissory note given for reducing a liability only operates as a conditional discharge for the liability. We need only refer to *Palaniappa Chetty* v. *Arunachellam Chetty*[1] and the judgment of Bhashyam Aiyangar, J., in *Jambu Chetty* v. *Palaniappa Chettiar.*[2] As regards the right to re-appropriate, it is clear in this case that no intimation was given to the surety of the first appropriation and therefore the Bank, when they sent a letter through their vakil, had a right to re-appropriate the amount. This is clear from the decision in *The Mecca*[3] and *Chegganmull Sowcar* v. *Manicka Mudaliar*[4] where it was observed that so long as notice had not been given as to the appropriation of any amount to any particular account, it is open to the creditor to alter it and make re-appropriation. If the defendant is liable, he is liable also for the amount of the promissory notes accepted as conditional payment by the Bank and which were dishonoured and on being dishonoured corresponding debits were made by the Bank in the account.

Then the last question is as regards the guarantee not being enforceable owing to concealment of facts. In this connection reference is made to S. 143 of the Contract Act which runs as follows:—

"Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid."

It is argued that the material circumstances in this case is that the fact that the date of the guarantee letter Ex. A about Rs. 5,000 was due by the firm already to the Bank not disclosed, and that on account of this non-disclosure the contract of indemnity is not enforceable. It is not disputed that on the date of Ex. A the amount which was due by Nanchappa Chettiar

1. (1911) 21 M.L.J. 432.
2. (1902) I.L.R. 26 M. 526: 13 M.L.J. 252.
3. (1897) A.C. 286.
4. (1925) 50 M.L.J. 242.

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under the current account was not mentioned; and the question is whether such non-mention vitiates the contract of indemnity. We have already given our reasons for holding that Ex. A, the letter of guarantee, covers past indebtedness also and that this fact was within the knowledge of the defendant when he signed it.

[Their Lordships discussed the evidence and continued.]

There is therefore no statement of the defendant that if he had been informed of this already existing debt of Rs. 5,000 he would not have signed the letter of guarantee. We must therefore treat the case on the footing that there is a duty cast on the Bank to disclose the past indebtedness under the current account of N. Nanchappa Chettiar irrespective of the defendant's knowledge to presume that that duty not having been performed the guarantee is invalid. We do not think that the authorities cited by Mr. Menon lead to this conclusion. The balance of authority is that there is difference between fiduciary guarantees and guarantees by persons in favour of Banks and that though in the former case there may be a duty to disclose all material acts there is no such duty in the case of a Bank which takes a guarantee from a person to disclose the indebtedness of the person guaranteed at the date of the guarantee. In *Hamilton* v. *Watson*[5] it was held by the House of Lords that a surety is not of necessity entitled to receive, without enquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and the party and that if he wants to know any particular matter he must take it the subject of a distinct enquiry. The learned Judges who took part in this decision were The Lord Chancellor, Lord Brougham and Lord Campbell. In *The North British Insurance Company* v. *Lloyd*[6] it was held that the rule which prevails in assurances upon ships and lives, that all material circumstances known to the assured must be disclosed, though there be no fraud in the concealment, does not extend to the case of guarantees and that in the latter case, the concealment, to vitiate the guarantee, must be fraudulent. In *Wythes* v. *Labouchere*[7] a similar view was taken. In that case Lord Chelmsford observes as follows:—

"I will consider the question of concealment solely upon the footing of the duty of the defendants towards the plaintiff as surety. It must of course be conceded that if the plaintiff had applied to the bankers, and they had given him a false account of the transactions between them and

5. (1845) 12 Cl. & F. 107: 8 E.R. 1339.
6. (1854) 10 Ex. 523: 156 E.R. 545.
7. (1859) 3 De G. & J. 593: 44 E.R. 1397.

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M'Gregor, the plaintiff would be entitled to be relieved from his suretyship. But not only was there no application to the defendants by the plaintiff, but they never came into communication with each other directly or indirectly in the transaction. Was there, under these circumstances, any legal, or, I would add, any moral obligation upon the bankers, when they learnt that the plaintiff was willing to become security to them for a large advance to M'Gregor, to search for him, and warn him against the danger of such a step, by communicating the condition of his old account, the security which they had taken, and the circumstances connected with the Parliamentary qualification? No case which has been cited goes this length or near it. Indeed the case of the *North British Insurance Company* v. *Lloyd*[6] expressly decides that the obligation of the creditor to communicate even material circumstances that are known to him is not co-extensive with the rule which prevails in insurances upon ships and lives; and that unless the non-disclosure amounts to a fraud upon the surety, he is not entitled to relief."

These cases have been considered in *London General Omnibus Company, Ltd.* v. *Holloway*[8] where it was held that suretyship for the fidelity of a servant is distinct from a guarantee in respect of a banking account. In that case Farwell, L.J., observes:

"There is a wide distinction between a case like the present and the cases which have been cited of guarantees for overdrafts given to bankers, such as *Hamilton* v. *Watson*[5] and *Wythes* v. *Labouchere*[7] and he points out the difference."

He further observes:

"No surety asked to guarantee a banking account is entitled to assume that the customer of the bank has not been in the habit of overdrawing; the proper presumption in most instances is that he has been doing so, and wishes to do so again. That is a legitimate carrying on of business, and that is what the surety is asked to guarantee."

Kennedy, L.J., observes:

"On the other hand, in the case of the suretyship or guarantee of a financial account, the previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure constitute only extrinsic circumstances. They may be material circumstances, such as might affect the judgment of the person who is asked to be surety. But, in the language of Sir Frederick Pollock (Principles of Contract, 8th Ed., p. 568), 'the creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates: and on this point there is no difference between law and equity.' The bank or other creditor cannot reasonably be taken as affirming, by mere silence respecting earlier dealings, the financial ability of the person whom the proposed surety is asked to guarantee."

Then the learned Judge quotes with approval a passage from Mr. Justice Rowlatt's work on Principal and Surety, p. 155. At page 154 the following passage occurs:—

"A guarantee will fail if the creditor misrepresents to the surety the state of accounts between the principal and himself. But a surety propos-

5. (1845) 12 Cl. & F. 107: 8 E.R. 1339.
6. (1854) 10 Ex. 523: 156 E.R. 545.
7. (1859) 3 De G. & J. 593: 44 E.R. 1397.
8. (1912) 2 K.B. 72.

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ing to guarantee a banking account should enquire whether there is any adverse balance already existing; he is not entitled to assume there is not."

So far as the Indian cases are concerned, in *Balkrishna V. N. Kirtikar* v. *The Bank of Bengal*[9] Sir Charles Sargent, C.J. and Bayley, J., took a similar view and held that the expression "keeping silence" in S. 143 of the Contract Act clearly implies intentional concealment as distinguished from mere non-disclosure and the withholding must be fraudulent, as necessarily is the case when a material circumstance is intentionally concealed. This case, so far as we are aware, has not been dissented from and is on a line with the English cases we have referred to. It is contended by Mr. Menon that there is no difference between fidelity contracts and contracts of guarantee in respect of banking accounts, that some eminent English Judges have dissented from the view that there should be any such difference and that in each case the question is whether there is evidence to go to the jury to say that the non-disclosures of the past liability which was existing at the date of the guarantee amounts to concealment of a material fact or not; and *Lee* v. *Jones*[10] is referred to. In that case there was a difference of opinion, Crompton, J., Channell, B., Blackburn, J. and Shee, J., taking one view and Pollock, C.B. and Bramwell, B., taking another view. We may state that Blackburn, J., refers to the decision in *Hamilton* v. *Watson*[5] and notes the distinction between the contracts referred to. He says:

"Now, whether the handing the agreement by the plaintiffs to the defendant amounted to an inaccurate representation or not, depends, as I think, on the question whether in such a transaction as that described in the agreement, it might or might not naturally be expected that the masters might have allowed a balance of this extent to accumulate, and might have allowed the account to stand over unsettled for so long a time. In *Hamilton* v. *Watson*,[5] the transaction was a security for a banker's cash account; and the decision of the House of Lords was that, in such a case, it might be so naturally expected that the proposed principal had already overdrawn his account, that there was no evidence of a representation that he had not."

Although Shee, J., took the view that there was no difference in principle between the contracts and that the question in the case was whether there was evidence for the jury to say that the suppression was material, Pollock, C.B., and Bramwell, B., took the opposite view. Reference was also made by Mr. Menon to *Railton* v. *Mathews*[11] where the Judges were of opinion that undue concealment need not be wilful or intentional with

5. (1845) 12 Cl. & F. 107 at 118: 8 E.R. 1339.
9. (1891) I.L.R. 15 B. 585.
10. (1864) 17 C.B. (N.S.) 482: 144 E.R. 194.
11. (1844) 10 Cl. & F. 934: 8 E.R. 993.

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a view to the advantages the employers were thereby to gain, but it was sufficient if it was material. This case related to a fidelity contract. A party became surety in a bond for the fidelity of a commission agent to his employers. The commission agent was entrusted with the property of his employers. The employers discovered irregularities in the agent's accounts and put the bond in suit. The surety then instituted a suit on the ground of concealment by the employers of material circumstances. It was held by the House of Lords that

> "Mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself."

We think that the balance of authority is clearly in favour of the view that where a person stands surety for another as regards an advance to be made by a bank, the bank is under no obligation to disclose any past indebtedness existing at the date of the contract of suretyship and that it is a matter on which the person standing as surety has to inform himself. If, of course, he wanted information and the bank gave wrong information it might vitiate the contract of suretyship. In the present case the defendant did not require any information as to the state of the account between the firm and the bank on the date of the suretyship. There can therefore be no question of the guarantee being invalid because of the non-disclosure by the bank that about Rs. 5,000 was due. Further, the defendant does not plead this in his written statement as a ground; he does not state that if he had been aware of the fact he would not have become surety. Even assuming that in every case it is for the surety there is nothing in the evidence which would entitle the jury to hold that if the defendant had been told that Rs. 5,000 was due by the firm he would not have stood surety. We find that Rs. 7,000 went in discharge of the indebtedness under the current account under which money was already due by the firm.

As regards the question of estoppel it is difficult to see where estoppel comes in on the pleadings in the written statement. What is stated is that because the bank said in Exhibit III that Rs. 2,000 and odd was due the defendant put in a petition mentioning that figure to adjudicate the principal debtors as insolvents. It is not suggested that he would not have done so if Rs. 10,000 had been claimed instead of Rs. 2,000; all that is stated is that he had to amend this petition by stating the correct amount due and this would involve some additional expenditure, however trifling it may be. The fact is that Exhibit II,

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the notice sent by the bank through their vakil giving full particulars, is dated 16th of June, 1924. . The insolvency petition was filed on the 12th of June, 1924. Admittedly until the 18th of September, 1925, nothing was done as the Judge points out. The mere filing of the insolvency petition would not amount to proof or admission of the amount due. That has to be proved in subsequent proceedings. It is not suggested that when the stage came the defendant relying upon the Exhibit III minimised his claim and got it admitted for a smaller sum whereas, as a matter of fact, a larger sum was due. In these circumstances it is difficult to see how there can be any estoppel by the defendant putting himself in a worse position owing to the conduct of the plaintiff.

We do not think that the decision of the Subordinate Judge can be supported on any of the grounds stated by him. The decree of the Subordinate Judge is set aside and in lieu thereof there will be a decree in favour of the plaintiff for Rs. 8,470-10-7 with interest at 6 per cent. from the date of the plaint to the date of payment with costs in this and the Lower Court on the entire amount decreed.

The Subordinate Judge's decree allowing any costs to the defendant will be set aside.

The case having been set down for being spoken to this day the Court made the following order:—

Credit will be given for the amounts already collected and no interest will run on the amounts collected.

K.C. *Decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASELY, *Chief Justice* AND MR. JUSTICE KRISHNAN PANDALAI.

The Public Prosecutor .. *Appellant**

v.

Lakshmamma .. *Accused.*

The Public Prosecutor *v.* Lakshmamma

Criminal Procedure Code (V of 1898), S. 417—Appeal against acquittal —High Court when can interfere.

In an appeal by Government against an acquittal the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure. Where there are some grounds to justify the judgment, or even just a reasonable doubt supporting the acquittal, the High Court will not interfere.

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*Cr. Appeal No. 420 of 1929. 27th November, 1929.

Queen-Empress v. *Robinson*, (1894) I.L.R. 16 All. 212 and *The Public Prosecutor* v. *Narayana Naidu*, (1915) 16 Cr.L.J. 529: 29 I.C. 657, approved.

The Public Prosecutor *v.* Lakshmamma.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Sessions Judge of Kurnool in Sessions Case No. 14 of 1929 on his file.

K. S. Vasudevan for accused.

The judgment of the Court was delivered by

Beasley, C. J

The Chief Justice.—On the 9th February last the deceased a young boy had climbed a fruit tree to get some berries or some other fruits which had grown on that tree. Beneath the tree was a little girl, the daughter of the accused, the respondent here. The little boy threw the fruits down on the ground from the tree above and the little girl picked up those fruits, whereupon the little boy climbed down from the tree and beat the little girl with a cholam stick. She went off to her home and complained to her mother (the respondent) about the beating. The mother then came up and pursued the little boy. Up to this point both the prosecution case and the defence case agree. The little boy sustained very serious injuries. He had three ribs broken on the one side and four on the other penetrating the pleural cavity and causing his death some two days later. The respondent was charged at the Sessions Court with murder under S. 302, Indian Penal Code.

The defence put forward by the respondent was that it was true that she pursued the little boy and that he was running away but in the course of his flight he tripped up and fell upon a stone or a boulder well imbedded in the ground and that was how he came by his injuries. The learned Sessions Judge after hearing the evidence agreed with the opinion of the four assessors in finding that the respondent was not guilty of the offence; and she was accordingly acquitted.

This is an appeal by Government against the acquittal. The case for the prosecution was that the respondent fisted, struck and kneed the little boy and was the cause of his broken ribs. The evidence for the prosecution was that after he sustained his injuries, however they were caused, the respondent led the little boy to his home. He was quite conscious then and afterwards for a little time and his mother, P.W. 2, does not appear to have thought that his injuries were of a serious nature. It was not until his death and the *post mortem* examination that the real nature of his injuries became apparent. But she questioned the little boy and, according to her evidence, he told her

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that he had been fisted, struck and kneed by the respondent. There are two witnesses in addition to herself who are supposed to have heard the statement of the little boy and they are P.Ws. 3 and 4. The learned Sessions Judge does not believe their evidence and we certainly think that it is open to suspicion. It seems to us very unlikely that they would have overheard this little boy's statement and the evidence is particularly suspicious when it is taken in conjunction with the evidence of P.W. 2 who says that they were not present and did not overhear the little boy's statement. We, therefore, think that the evidence of these two witnesses can quite properly be rejected. Then there is an eye-witness to this occurrence, P.W. 7, who says that he was picking groundnuts in a field and saw the flight of the little boy and his being beaten by the respondent. A good deal of criticism was levelled against this evidence because it was said that his evidence was obviously untrue as there were no groundnuts to be picked at that time. But P.W. 9 says that there was a groundnut crop upon the land. The remainder of the evidence is that of witnesses who give evidence on the part of the case in which there is an agreement between the defence and the prosecution, namely, about the little boy being up the tree and the respondent coming up and chasing him. The medical evidence is certainly far more consistent with these injuries having been caused to the boy in the manner described by the prosecution witnesses and by the little boy himself though it is quite true that the medical witness stated that these injuries might possibly have been caused by the little boy falling down and his chest coming into contact with a stone. But reading the evidence, the plain understanding of it, we think, is that it is unlikely that in the opinion of the medical witness, the injuries were caused by falling on a stone. The reason the witness gives for saying that it is far more consistent with these injuries being caused by blows is that no marks or bruises in the hands or the body were found by him and from this he deduces that the little boy did not fall. But as against this, there is the criticism to be made that the body was in a decomposed state when the medical witness saw it and there is the statement of P.W. 2 in Ex. B that there was an abrasion on the leg of the little boy. The conclusion we have come to in this case is that upon the evidence the prosecution case was sufficiently strong to justify a conviction for an offence and that it establishes the fact that the injuries were caused to the little boy by this woman.

But we have got to consider what test should be applied by the High Court on an appeal by Government against an acquit-

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tal. Is the test to be that in the opinion of the appellate Bench there should have been a conviction sufficient to justify allowing the appeal or should it be something much more strong on the facts before the High Court is entitled to allow that appeal? We have not had any cases cited to us but we have discovered two cases which lay down a test which we think is the correct one to be applied in such cases as this. The first of them is *Queen-Empress* v. *Robinson.*[1] In that case it was held that an appeal on behalf of Government in the exercise of the powers conferred by S. 417 of the Code of Criminal Procedure should not be entertained when the judgment appealed from is based upon facts and the conclusions of the Court are such as may reasonably be arrived at upon the facts found. The other case is a decision of a single Judge, Kumaraswami Sastri, J., in *The Public Prosecutor* v. *Narayana Naidu.*[2] There it was held that in appeals against acquittals the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure. That is saying the same thing which was said in the Allahabad case in different words. We think that those tests are the proper ones. At a trial in a Sessions Court or in any other Court in which evidence is taken, the trial Judge or Magistrate, as the case may be, has the witnesses before him and he is really in a better position to decide whether those witnesses give correct evidence and in this case the Sessions Judge has disbelieved most of the prosecution witnesses. We cannot say that there were not some grounds which might justify the acquittal of the respondent in this case. We are unable to say that the judgment of the learned Sessions Judge is perverse or one which no reasonable man could have come to on the facts. There was just a reasonable doubt and, that being so, we are unable to interfere with that judgment and this appeal by Government must be dismissed.

B.V.V. *Appeal dismissed.*

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1. (1894) I.L.R. 16 A. 212.
2. (1915) 16 Cr.L.J. 529: 29 I.C. 657.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Sivaramakrishna Aiyar and another .. *Petitioners** (*Petrs.-Plffs.*)

v.

Sankaranarayana Aiyar and others .. *Respondents* (*Respts.-Defts.* 1 *to* 3).

Sivarama krishna Aiyar *v.* Sankara-narayana Aiyar.

Hindu Law—Joint family—Suit for partition—Alienees of joint family properties how and when can be made parties—Costs to added parties.

In cases relating to partition of Hindu joint-family properties, alienees of joint-family properties may be made parties at the instance of parties other than plaintiffs.

Sitaramaya v. *Ramappayya,* (1916) 5 L.W. 207, followed.

Whether anybody should be made to pay the costs of the added parties depends on the finding in the case after the trial.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Tinnevelly, dated 15th August, 1929, in I.A. No. 408 of 1929 in O.S. No. 12 of 1929.

T. M. Krishnaswami Aiyar and *S. Ramaswami Aiyar* for petitioners.

K. V. Krishnaswami Aiyar and *K. Venkateswaran* for respondents.

The Court delivered the following

JUDGMENT.—This revision petition is filed against an order of the Subordinate Judge of Tinnevelly refusing to strike out the names of defendants 4 to 16 who had been previously added as parties to the suit O.S. No. 12 of 1929. The suit was one for partition. The 1st and 2nd defendants are the sons of the 1st plaintiff and the 3rd defendant is the son of the 1st defendant. The 2nd plaintiff is the grandson of the 1st plaintiff. On the 1st defendant's allegations that there had been alienations of the family properties by the 1st plaintiff in favour of defendants 4 to 16 they were previously directed to be made as parties by the Court. Now the plaintiffs apply that they may be expunged. The Subordinate Judge refused the plaintiffs' prayer and hence this revision petition. Before me the learned advocate for the plaintiffs relies on the case

*C.R.P. No. 1463 of 1929. 19th March, 1930.

Sivarama-krishna Aiyar v Sankara-narayana Aiyar.

Norris v. *Beazley*[1]. There Coleridge, C.J., pointed out that defendants to be added must be defendants against whom the plaintiff has some cause of complaint and it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim. This is perfectly true and it is no doubt the general rule, but as Denman, J., in the same case points out, if a very strong case is made out other parties against whom the plaintiff does not wish to proceed may be made parties. In cases relating to partition of Hindu joint-family properties, alienees of joint-family properties may be made parties at the instance of the parties other than the plaintiffs. Similarly the case in *Sitaramaya* v. *Ramappayya*[2] is a case where it was found that there was no need to bring in additional parties and if such a need is found additional parties will be rightly made parties. On the allegations of the 1st defendant the order of the Court below is right. It may be that if the 1st defendant fails to make out his case ultimately the costs due to the added parties should be paid by him. If he succeeded in making out his case then it may be that the plaintiffs may be liable for the costs of these parties. Whether anybody should be made to pay the costs of the added parties depends on the finding in the case after the trial. It is said that the plaintiff has to send summonses to these defendants. So far as this is concerned, I direct that copies of the plaints and the summonses should be issued at the expense of the 1st defendant. Subject to this modification the order of the Subordinate Judge is confirmed and the petition is dismissed with costs.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTA-KRISHNA AIYAR.

T. V. Gopalakrishna Aiyar and another .. *Appellants**

v.

The Official Receiver of South Malabar at Calicut and others .. *Respondents*

(*Respt. and Additional Respts.*)

Gopala-krishna Aiyar v. The Official Receiver of South Malabar, Calicut,

Provincial Insolvency Act (V of 1920), S. 46—Mutual dealings between insolvent and creditor—Account taken—Time-barred debt due by

*C.M.A. No. 13 of 1926. 24th July, 1930.

1. (1877) L.R. 2 C.P.D. 80. 2. (1916) 5 L.W. 207.

Gopala-krishna Aiyar *v.* The Official Receiver of South Malabar, Calicut.

creditor—Official Receiver whether can set off against claim of creditor —Meaning of word "due".

Where, in a case of mutual dealings between an insolvent and a creditor, an account is taken under S. 46 of the Provincial Insolvency Act, 1920, the Official Receiver has no right to set off against the creditor's claim a time-barred debt due by the creditor.

Per *Reilly, J.*—The word "due," as used in S. 46, means "legally recoverable" and not "justly due".

Appeal against the order of the District Court of South Malabar at Calicut in C.M.A. No. 6 of 1925 preferred against the order of the Official Receiver of South Malabar, Calicut, on the claim petition, dated 17th August, 1924 and made in I.P. No. 25 of 1923, District Court, South Malabar.

C. S. Swaminathan for appellants.

T. S. Anantaraman for respondents.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—This is an appeal against the order of the District Judge of South Malabar in an insolvency matter. The appellant, a creditor of the insolvent, has put in a claim before the Official Receiver for an amount which he says is due to him from the insolvent. The learned District Judge has found that the Official Receiver is entitled to set off against that claim a time-barred debt due from the creditor to the insolvent. I do not think it can be disputed, and I did not understand Mr. Anantaraman for the Official Receiver to dispute, that a creditor in an insolvency can prove only a debt which at the date of the adjudication has not become time-barred. If we examine sections 34 and 28 (2) of the Provincial Insolvency Act, I do not think that there can be any doubt on that point. But it is suggested that, although the creditor cannot recover from the insolvent a time-barred debt and although a day before he is adjudged insolvent the insolvent himself could not set off against the creditor a time-barred claim, the Official Receiver has a higher right and can set off against the creditor's claim a time-barred claim. That appears to me to be a very startling proposition. Mr. Anantaraman argued that it can be founded on the wording of S. 46 of the Provincial Insolvency Act. That section runs:

"Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

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Reilly, J.

Now in that section Mr. Anantaraman contends "due" does not mean "legally recoverable" but "justly due"; and he has pointed out that in S. 60 of the Contract Act "due" is used of a debt which is no longer legally recoverable from the debtor but which is actually and justly due from him. No doubt the word "due" is used in that sense in S. 60 of the Contract Act; but we have to ascertain in what sense it is used in S. 46 of the Provincial Insolvency Act. I think that, if we try to work that section out, there can be no doubt that "due" as used in it means "legally recoverable" because, if it includes not only debts which are legally recoverable but also debts which have become time-barred, then that meaning of the word must apply to both parties, and, if we take into account what is due otherwise than legally recoverable from the insolvent to the creditor and from the creditor to the insolvent and arrive at the balance in the way indicated in the section, the balance may well be in favour of the creditor by reason of a time-barred debt due to him. The result of that would be that under the Insolvency Act a creditor could recover a time-barred debt, which I think is entirely out of the question. For that reason alone without discussing the matter further, I may mention neither side has been able to find any authority on this point, it appears to me clear that the learned District Judge's view of the matter is wrong and that the Official Receiver in this case has no right to set off against the creditor's claim a time-barred claim against the creditor.

But it is represented to us that, although the learned District Judge disposed of the appeal on his view of the law in this matter and then sent the case back to the Official Receiver to be worked out in accordance with that view, it has not yet been determined whether the claims of the insolvent against the creditor are actually time-barred, and that question, of course, must be investigated. So, although I do not agree with the learned District Judge's view of the law, I agree with him that it is necessary that this case should go back to the Official Receiver for further investigation.

In the circumstances the appellant is entitled to his costs on this appeal.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—I agree. I wish to add that the object of section 46 of the Provincial Insolvency Act is not to do away with the provisions of the Limitation Act and to revive claims already barred by limitation before a person became insolvent. The logical result of the contention raised by the learned advocate for the respondent would be that once

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a person becomes insolvent, not only could the Official Receiver representing the estate of the insolvent enforce claims of the insolvent which had become barred by limitation long before the insolvency but also the creditors of the insolvent whose debts had become barred by limitation long prior to the insolvency could seek to enforce such claims against the estate of the insolvent in the hands of the Official Receiver. In the absence of any specific provision in the Insolvency Act, I am not prepared to agree to a contention which leads to such results. I can understand that claims not barred by limitation on the date of adjudication should be taken to be not barred so long as the adjudication subsists; but the contention that the effect of insolvency is to revive debts already barred by limitation is, I think, a startling one, and, in the absence of authority, should not be accepted. No decision of any English or Indian Court in support of such a contention has been cited before us.

It seems to me that the object of S. 46 of the Provincial Insolvency Act is to provide for a just and equitable mode of adjustment of mutual dealings of the insolvent and his creditor; but for such a provision the creditor of an insolvent if he also owed a debt to the insolvent would have to pay the whole of the debt to the Official Receiver, that is, he will have to pay the full sixteen annas in the rupee in respect of the debt due by him to the insolvent's estate, whereas he would be entitled to receive from the estate only *pro rata* dividend from the estate. Such a result was considered unjust and equitable in cases where "mutual dealings" of the nature contemplated by the section existed between the parties. The section accordingly provides that "an account shall be taken of what is due from the one party to the other in respect of such mutual dealings and that the sum due from the one party shall be set off against any sum due from the other party, and the balance of account and no more shall be claimed or paid on either side respectively."

Whether any amounts are due from the one party to the other and whether they are barred by limitation are all questions to be decided under the general law, and S. 46 only provides how the respective rights of the parties should be adjusted by set off in cases of mutual dealings.

I agree with my learned brother that the appeal should be allowed.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

Komalangi Ammal (minor) by her father and guardian Kandasami Chettiar .. *Appellant**

v.

M. K. Sowbhagiammal and another .. *Respondents.*

Komalangi Ammal *v.* Sowbhagiammal.

Will—Probate—Caveat—Interest in estate—Person claiming properties disposed of by will—Right to enter caveat—Probate and Administration Act, 1881, *S.* 69.

The interest which entitles a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate.

Where, in an application for the grant of probate of a will, a caveat was filed by a person alleging that certain jewels, which the testator had disposed of by his will, were the property of the caveator,

Held, that the caveator did not have such an interest in the estate of the deceased as will entitle her to oppose the grant of probate.

Case-law reviewed.

Hanumantha Rao v. *Letchamma,* (1926) I.L.R. 49 M. 960: 51 M.L.J. 563, commented on.

Decision of Venkatasubba Rao, J., reported in *Sowbagiammal* v. *Komalangi Ammal,* (1928) 54 M.L.J. 382, affirmed.

On appeal from the judgment and decree of the Honourable Mr. Justice Venkatasubba Rao, dated the 16th, 17th, 18th and 24th days of January, 1928, and passed in the exercise of the Original Testamentary Jurisdiction of the High Court in T.O.C. No. 13 of 1927.

The respondents who were the executors named in a will applied for probate thereof. Two caveats were filed, one of them being by the appellant. An objection was taken on behalf of the respondents that the appellant did not possess such an interest as to support the caveat. The interest alleged on behalf of the said caveator was that the testator had purported to dispose of by will her stridhanam jewels as if they belonged to him.

The learned Trial Judge Venkatasubba Rao, J., held as follows on a review of the authorities:—

"I am asked to go into the question of ownership of these jewels and declare by my judgment that the deceased was not the owner and that his will in regard to them is inoperative. Two things I regard to be clearly settled by authority, firstly, that the interest alleged is not an interest as would support a caveat, and, secondly, that a probate Court does not decide questions of title in regard to the property disposed of by the will."

The objection was consequently upheld.

The caveator preferred an appeal.

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*O.S.A. No. 27 of 1928. 11th February, 1930.

Komalangi Ammal *v.* Sowbhagiammal.

B. C. Seshachala Aiyar for appellant.

V. Radhakrishnayya and *A. Kuppuswami Aiyar* for respondents.

The Court delivered the following

Rames m, J.

JUDGMENTS. *Ramesam, J.*—Most of the decisions of all the High Courts are against the appellant. They are referred to by the learned Trial Judge and need not be repeated. The learned advocate for the appellant relies on *Hanumantha Rao* v. *Letchamma.*[1] This case has been considered by the Trial Judge. It is based on *In the matter of the Petition of Bhobosoonduri Dabee*[2], a case which has not been followed in the Calcutta High Court ever since and certain other decisions. The cases in *Arakal Bastian Ansap* v. *Narayana Aiyar*[3] and *Kishen Dai* v. *Satyendra Nath Dutt*[4] also referred to in it are cases of judgment-creditors of a son of the testator. In *Arakal Bastian Ansap* v. *Narayana Aiyar*[3] the will was revoked and it was not necessary to rely on *In the matter of the Petition of Bhobosoonduri Dabee.*[2] The decision in *Brinda Chowdhrain* v. *Radhica Chowdhrain*[5] is the case of a widow entitled to maintenance against her husband's estate, the husband being the alleged testator. I do not see how *Kishen Dai* v. *Satyendra Nath Dutt*[4] supports the decision in *Hanumantha Rao* v. *Letchamma.*[1] It is unnecessary for us to say whether *Hanumantha Rao* v. *Letchamma*[1] is correctly decided or not and we are not to be taken as agreeing with all the observations in it.

In a case of the kind before us, all the authorities are agreed that the caveator has no interest to oppose the grant of the probate. In so far as she claims that the jewels dealt with in the will are hers, it is not an interest in the estate of the deceased according to all the authorities. Whether the will is genuine or not, her right to the jewels cannot be affected. In so far as she claims to be the wife of one of the grandsons, and can claim to be supported from the estate, her position under the will is no worse than if the will did not exist.

The case of *Kipping* v. *Ash*[6] does not help the appellant. The appeal is dismissed with costs.

Cornish, J.

Cornish, J.—I agree that the appeal should be dismissed. The interest which entitles a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there

1. (1926) I.L.R. 49 M. 960: 51 M.L.J. 563.
2. (1880) I.L.R. 6 C. 460.
3. (1910) I.L.R. 34 M. 405.
4. (1901) I.L.R. 28 C. 441.
5. (1885) I.L.R. 11 C. 492.
6. (1845) 1 Rob. Eccl. 270.

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must be no dispute as to the title of the deceased to the estate [see *Pirojshah Bikhaji* v. *Pestonji Merwanji*[7] and *Kalajit Singh* v. *Parmesher Singh*[8]]. But here the caveator is alleging that the jewels which the testator has disposed of by his will are her own property. In other words, she is setting up a title adverse to the testator's title to the property. It is impossible to say that she has an interest in the deceased's estate when she is claiming that the property in question does not form part of the deceased's estate. It has long been settled that it is not the province of a Court of Probate to determine questions of title to a property which a testator purports to dispose of by his will, the reason being that the grant of probate does no more than establish the *factum* of the will and the appointment of the executors (if any) named in the will. The grant of probate will not, therefore, prevent the appellant from bringing a suit, if she should be so advised, to recover from the executors, or any other persons in possession, the jewels which she claims as her own property.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Kethireddi Kodandarami Reddi, minor, by mother and next friend Seethamma .. *Appellant** (*Deft.*)

v.

Kethireddi Chenchamma .. *Respondent* (*Plff.*).

Kodandarami Reddi v. Chenchamma.

Hindu Law—Maintenance—Whether the private funds of a widow yielding income ot be taken into account in awarding costs in maintenance suits.

In arriving at the amount of maintenance due to a Hindu widow, in cases where a joint family possesses properties the income from which is not only enough but more than enough for the purpose of paying maintenance to all the members depending upon the same, the fact that one is in possession of private funds which also yield an income or the circumstance that such a member is himself or herself earning as a result of his or her activity, should not be taken into account for such purposes.

Lingayya v. *Kanakamma*, (1913) I.L.R. 38 M. 153: 28 M.L.J. 260, referred to.

Principle laid down in *Teyan Nair* v. *Ragavan Nair*, (1881) I.L.R. 4 M. 171, *Ekanat Thayu Kunji Ama* v. *Ekanat Shangunni Valia Kymal*, (1882) I.L.R. 5 M. 71, *Manikkath Ammini Ammal* v. *Padmanabha Menon*, (1918) I.L.R. 41 M. 1075: 35 M.L.J. 509 and *Maradevi* v. *Pammakka*, (1911) I.L.R. 36 M. 203 at 211: 22 M.L.J. 309, applied by way of analogy.

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*S.A. No. 449 of 1926. 11th October, 1929.

7. (1910) I.L.R. 34 B. 459. 8. (1917) 39 I.C. 573.

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In the absence of any *prima facie* excessive or exaggerated claim made in the plaint the plaintiff should not be directed to pay the defendant's costs on the portion disallowed.

Rangathayi Ammal v. *Munuswami Chetty,* (1911) 21 M.L.J. 706, followed.

Second appeal against the decree, dated 27th August, 1925, of the Court of the Subordinate Judge of Nellore in Appeal Suit No. 30 of 1925 (A.S. No. 385 of 1924, District Court, Nellore) preferred against the decree of the Court of the District Munsif of Kavali in O.S. No. 196 of 1923.

K. Ramamurthi and *M. Venkatasubbiah* for appellant.

B. Somayya for respondent.

The Court delivered the following

JUDGMENT.—This second appeal preferred by the defendant arose out of a suit for maintenance filed by his step-mother against him, a minor. The plaintiff and the defendant's mother are co-widows and they were married on the same day to Chinna Subba Reddi who died on 16th April, 1918. The plaintiff filed her suit for maintenance on 12th April, 1923 and she claimed future maintenance from April, 1923, at Rs. 40 per mensem and also Rs. 120 for arrears of maintenance for January, February and March, 1923. The main plea of the defendant was that there was a will executed by the defendant's father under which the plaintiff was entitled to only the income from the two acres of wet land mentioned in the will, and that in any event she had jewels to the extent of Rs. 800 and also monies to the extent of Rs. 2,000, and consequently she was not entitled to maintenance claimed in the plaint. The District Munsif held that the plaintiff was entitled to maintenance, since the question relating to the will set up by the defendant was withdrawn by him at the time of the trial. As regards the jewels, the District Munsif found that the plaintiff was in possession of jewels worth Rs. 800 but that no account could be taken of them in calculating the amount of maintenance awardable to plaintiff, as they are her *stridhanam* and are of an unproductive character. As regards the sum of Rs. 2,000 which the defendant alleged that the plaintiff had, the District Munsif held that the plaintiff had this amount of Rs. 2,000 at the time of her husband's death, but that "the same should be taken to have been set off against her for her past maintenance, since the plaintiff did not claim maintenance from 1918 to 1923." In the result, the Trial Court granted the plaintiff a decree for her maintenance at the rate of Rs. 36 per mensem. The defendant thereupon preferred an appeal, and the learned Subordinate Judge agreed with the Dis-

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trict Munsif that the plaintiff had Rs. 2,000 with her at the time of her husband's death. He also reiterated the argument advanced by the learned District Munsif that the plaintiff did not claim any maintenance for the period from April, 1918 to January, 1923 and that he would take that circumstance also in fixing the rate of maintenance. On the merits, the learned Subordinate Judge held that the plaintiff was entitled to maintenance at the rate of Rs. 25 per mensem in respect of food and clothing and sundry amenities, Rs. 3 per mensem for a servant and Rs. 3 per mensem for house rent. He modified the decree of the District Munsif by reducing the amount of maintenance from Rs. 36 to Rs. 31. The defendant has preferred this second appeal.

The learned advocate for the appellant argued that both the Lower Courts having found that the plaintiff had Rs. 2,000 at the time of her husband's death, and no claim being made in respect of the arrears due to her from 1918 to 1923, the Lower Courts were not right in ignoring the possession of the said sum of Rs. 2,000 in fixing the rate of future maintenance. In support of his contention, the learned advocate relied on a passage in Mayne's Hindu Law, para. 459, which runs thus:—

"In calculating the amount of maintenance to be awarded to a female, her own *stridhan* is not to be taken into account, if it is of an unproductive character, such as clothes and jewels. For she has a right to retain these, and also to be supported, if necessary, by her husband's family. But if her property produces an income, this is to be taken into consideration. For her right is to be maintained, and so far as she is already maintained out of her own property, that right is satisfied."

The learned author proceeds to state in the next sentence as follows:—

"The right to maintenance is an absolute one and the consideration of her private means is primarily only a means for fixing the quantum of maintenance to be assigned to her; but if those means were shown to be sufficient in themselves to support her adequately in her station of life, her right to maintenance would be wholly in abeyance, though it might revive on a change in her circumstances."

With reference to this argument, the learned advocate for the respondent contended that (with all respect to the learned author) the statement should be taken with necessary qualifications in the circumstances of each particular case. No doubt in cases where the income from the joint family property is not sufficient to maintain properly all the members who are entitled to maintenance out of the same, it would be proper that the private properties of any particular member and the income thereof should be taken into account in fixing the amount of maintenance due to such member having private means. But

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the learned advocate argued, in cases like the present where the income from the joint family property is not only enough to provide decent maintenance for all those who are entitled to maintenance out of the same, but there is also surplus left, it is not right, and there is no law which would compel the Court, to take into account the income from the private properties of a person when awarding her maintenance. It would appear that in Bombay the rule enunciated by Mr. Mayne prevails. But so far as this Presidency is concerned, the learned Judges Benson and Sundara Aiyar, JJ., in the case reported in *Lingayya* v. *Kanakamma* [1] have not followed the principles of law followed by the Bombay High Court. The learned Judges observed as follows:—

"The fact that a Hindu widow is able to maintain herself out of other property is no ground for not giving her some maintenance out of her husband's estate; but it is a factor to be taken into account in determining the quantum of maintenance to be decreed to her."

The decision in *Ramawati Koer* v. *Manjhari Koer*[2] to the contrary is specifically dissented from by the learned Judges of this Court in *Lingayya* v. *Kanakamma.*[1] But it was pointed out by the learned advocate for the appellant that even the decision in *Lingayya* v. *Kanakamma* [1] states that it is a factor to be taken into account in determining the quantum of maintenance to be decreed to her. It is therefore necessary to see how far the learned advocate's contention is borne out by the decision in *Lingayya* v. *Kanakamma.*[1] For this purpose it is necessary to state the facts of that case. There, both the Lower Courts found that the defendant was in possession of family property yielding about Rs. 100 a year. They also found that the plaintiff (widow) had private property out of which she could get Rs. 40 or 50 a year. The Lower Courts in these circumstances awarded to the plaintiff Rs. 20 a year on the ground that the plaintiff's income from her own sources of Rs. 40 or Rs. 50 was not sufficient to cover her maintenance. The defendant preferred a second appeal, and on his behalf it was contended that the plaintiff (widow) having been found to be in possession of private property out of which she could get Rs. 40 or Rs. 50 a year and the defendant having been found to be in possession of the joint family property yielding only Rs. 100 a year, the Lower Courts were wrong in awarding to the plaintiff Rs. 20 a year out of the joint family income. To that the learned Judges answered in effect:

1. (1913) I.L.R. 38 M. 153: 28 M.L.J. 260.
2. (1906) 4 C.L.J. 74.

"It is not so. The plaintiff's right to maintenance is to be traced to the old law under which the plaintiff was even entitled to a share. The right to maintenance is an absolute right and you cannot deprive the plaintiff of her right to maintenance in the way you suggest."

To quote the exact words of the learned Judges:

"His argument is that a widow who is able to maintain herself out of other property has no right to claim out of her husband's estate anything for that purpose. In our opinion this view cannot be supported. It is based on an entirely wrong conception of the right sought to be enforced. . . . . This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves."

They, therefore, held that though the joint family income was not enough to maintain all the members of the family in a proper state, the plaintiff must be held entitled to some maintenance out of her husband's estate. The amount awarded by the Lower Courts was Rs. 20 a year against which there was no appeal by the plaintiff and the learned Judges dismissed the defendant's appeal and declined to accede to the contention that the plaintiff (widow) was in the circumstances not entitled to get maintenance at all. As I understand that judgment, it is no authority for the position contended for by the learned advocate for the appellant in this case that even in cases where the joint family income is sufficient and in fact more than is sufficient for maintaining properly all the members depending upon it, when a widow claims maintenance, if in possession of her own property which yields some income, the Courts are bound to take into consideration the income so derived by her from her own property. My attention has not been drawn to any case in Madras which goes to this extreme extent, and I do not understand the passage quoted from Mayne's Hindu Law by the learned advocate for the appellant as giving support for such an exteme contention. No doubt, the learned author does say that in particular cases the right to maintenance would be wholly in abeyance. But this particular aspect of the question has not been considered by the learned author, and, in any event, I am not prepared to say that any decided cases in Madras compel me not to give effect to the view that I have expressed above.

Arguments by analogy should not be pressed too far. But if one is permitted to take a somewhat analogous case, questions have arisen in Malabar where junior members of a tarwad claim maintenance from the income of the tarwad property; and though the income from the tarwad property is enough and more than is necessary to maintain all the members decently,

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yet it was argued that if the plaintiff, a junior member, be proved to have private property of his own which yields private income to him, the same should be taken into consideration in fixing the amount of maintenance due to him. This Court repelled that argument in the case reported in *P. Teyan Nair* v. *P. Ragavan Nair*,[3] where it was held that a karnavan of a tarwad is not justified in excluding a junior member from participation of the family property, because the junior member has other property of his own and the circumstance that the junior member has other property is not an element in the consideration of his right to share in the enjoyment of the joint family funds which are enough and more than necessary for such purposes.

As I am of opinion that the principle applied by this Court in the case of maintenance claimed by junior members of a Malabar tarwad in possession of private funds should be the principle that should ordinarily be applied to cases where Hindu widows claim maintenance from the estate of their husbands or from the estate of the joint family in which their husbands had a share, I proceed to note the trend of decisions under Malabar Marumakkathayam Law. In the case reported in *P. Teyan Nair* v. *Ragavan Nair*[3] Innes and Tarrant, JJ., held as follows:—

> "The circumstance that a junior member has other property is not an element in the consideration of his right to share in the enjoyment of the joint family funds. If it were, a man's own individual industry and exertions might be the means of depriving him of his rights in the joint property."

A similar question arose in the case reported in *Thayu* v. *Shangunni*,[4] where Sir Charles Turner, *Kt.*, Chief Justice and Muthuswami Aiyar, J., observed at page 72 as follows:—

> "The circumstances of each member in respect of his private acquisitions would not affect his right to subsistence where the income was sufficient to provide a suitable subsistence for all the members of the tarwad; but where the income is insufficient for this purpose, the karnavan must, with due regard to the interests of all, look to the private means of each."

These cases were taken to lay down the law correctly in *Manikkath Ammini Ammal* v. *Manikkath Padmanabha Menon*[5] and *Maradevi* v. *Pammakka*.[6] I do not understand the decision in *Mahesh Partap Singh* v. *Dirgpal Singh*[7] to lay down a different rule of law.

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3. (1881) I.L.R. 4 M. 171.
4. (1882) I.L.R. 5 M. 71.
5. (1917) I.L.R. 41 M. 1075: 35 M.L.J. 509.
6. (1911) I.L.R. 36 M. 203 at 211: 22 M.L.J. 309.
7. (1899) I.L.R. 21 A. 232.

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The question would be important in these days of social advancement when widows belonging to joint Hindu families might find themselves able to earn a part of their maintenance by doing honourable work elsewhere. If the result of their honourable activity and laudable attempts to earn a portion of their maintenance should work against them in claiming maintenance from their husbands' estate, in my opinion it will be a disadvantage both to them and to the family. The interests of social advancement (if one is entitled to have regard to the same) would be in favour of allowing her claim as put forward in the present case. If the result of her activity in earning or saving money by laudable means be to deprive her of her right to receive proper maintenance from the husband's estate which is admittedly rich, such people would have no inducement to work or to save. On the other hand, it would be in the interests of the joint family also to encourage such earning and saving. It therefore seems to me that in the cases where the joint family income is sufficient to allow maintenance to all members, the possession by members of separate property yielding income or the circumstance that such members are themselves earning as a result of their activity should not be taken into account. The question will be different when the income from the joint family estate is not enough to maintain all the members depending upon it. The law as administered in Bombay would seem to be different. See *Savitri Bai* v. *Luximi Bai* and *Sadasiv Ganoba.*[8] See also *Shib Dayee* v. *Doorga Pershad.*[9] If the property in her possession be property belonging to the husband or to the estate of the joint family, then the matter might (I have not to decide that question here) stand on a different footing. But so far as Madras is concerned, I am not aware of any decision which would prevent me from applying by analogy the principles laid down in the Madras cases referred to by me already to cases of joint Hindu families where the income from the joint family properties is more than enough to maintain properly all members having rights to the same.

For the above reasons, I am inclined to hold that, in cases where a joint Hindu family possesses properties, the income from which is not only enough but more than enough for the purpose of paying maintenance to all the members depending upon the same, the fact that one is in possession of private funds which also yield an income should not be taken into

8. (1878) I.L.R. 2 B. 573 (F.B.). 9. (1872) 4 N.W.P. 63.

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account for such purposes. In the present case the plaintiff and the defendant's mother are co-widows. The only member of the family is the defendant who is a minor. There are also two young girls, sisters of the defendant, who have to be married in due course. The lower appellate Court in paragraph 6 of its judgment has taken that matter into consideration. It says in paragraph 5 that the family is quite in affluent circumstances and that the net income of the family may reasonably be estimated to be Rs. 3,000 per annum. Having regard to all the circumstances, I think it was open to lower appellate Court to entirely disregard the possession of the plaintiff of the sum of Rs. 2,000 which represented her private property. If I am right in this view, the argument pressed upon me by the learned advocate for the appellant fails. It must be stated that the sum of Rs. 2,000 is plaintiff's own moneys, and not moneys belonging to the joint family.

Mr. Somayya, the learned advocate for the respondent, supported the finding of the lower appellate Court by another argument, namely, even if it be held that the plaintiff had Rs. 2,000 at the time of her husband's death, as the plaintiff had to support herself from 1918 to 1922 even calculating maintenance at the rate now decreed, there would be only about Rs. 400 left in the hands of the plaintiff. That is a small amount, and as both the Lower Courts have said in their judgment that they have taken that point also into consideration in fixing the maintenance, there is no ground for interference by this Court in the second appeal. On the whole, I have come to the conclusion that the award of maintenance of Rs. 31 per mensem by the lower appellate Court is not open to attack on any legal ground in second appeal. That being so, the main ground of the appellant fails and the second appeal is dismissed with costs.

The plaintiff has filed a memorandum of objections in respect of (1) the rate of maintenance, and (2) costs. As regards the former, I am not in a position to say that any legal error has been committed by the lower appellate Court in fixing the amount of maintenance. That being so, the memorandum of objections, so far as this item is concerned, fails.

As regards costs, though the plaintiff had claimed maintenance at the rate of Rs. 40 per month and though the District Munsif allowed only Rs. 36, the District Munsif did not allow any costs to the defendant in respect of the difference disallowed by him, but directed that the defendant should pay the plain-

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tiff's costs in respect of so much of the claim as was decreed to her. On appeal, the learned Subordinate Judge decreased the rate of maintenance from Rs. 36 to Rs. 31. The learned Subordinate Judge, however, modified the decree of the first Court with reference to costs. The order as to costs passed by the lower appellate Court was that the plaintiff should pay the defendant's costs on the portion of her claim disallowed in both the Lower Courts and that the defendant should pay plaintiff the costs in both the Lower Courts in respect of so much of her claim as was allowed. I think that this is not the proper order as to costs that should have been passed in this case. It is not possible to foretell or predict accurately the amount of maintenance that a person will be entitled to, in the opinion of the Court. What the Courts have to look into in such circumstances is to see whether there was any *prima facie* excessive or exaggerated claim made in the plaint. In this case the plaintiff claimed Rs. 40 and the lower appellate Court has decreed at Rs. 31 per mensem. The difference is not much, and I could not surely say that the claim was exaggerated to such an extent that the plaintiff should be directed to pay the defendant's costs on the portion disallowed. In this respect, I follow the decision of this Court in the case reported in *Ragathayi Ammal* v. *Munusawmi Chetti*[10] where the rule as to costs to be followed in maintenance suits was discussed by the learned Judges. I modify the decree of the lower appellate Court in respect of costs, and pass the following order:—In both the Lower Courts the plaintiff's costs on the amount allowed to her shall be paid by the defendant. The defendant will bear his own costs on the excess portion disallowed. In second appeal, the appellant will pay the respondent's costs. I make no order as to costs in the memorandum of objections, which I have allowed in part.

K.C. *Main Appeal dismissed.*

Memorandum of Objections allowed in part.

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10. (1911) 21 M.L.J. 706.

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD ATKIN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Lala Ram Narain and others .. *Appellants**

v.

Radha Kishen Moti Lal Chamaria (a firm) .. *Respondents.*

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Companies Act of 1913, *S.* 109—*Registration of mortgage pursuant to—Failure—Effect—S.* 120—*Extension of time for registration under—Order of—Reservation in, of rights of any mortgagee accrued in the meantime—Meaning and effect of—Mortgage expressly stated to be only second mortgage if converted into first mortgage merely by priority of registration.*

The Pioneer Mills, Ltd. (hereinafter called the Company), who carried on the business of sugar manufacturers, executed, on 10th August, 1922, a mortgage in favour of the plaintiffs, the property comprised in the mortgage being the Company's sugar refinery and distillery. It was stipulated that the mortgage should be treated as a second mortgage against the sugar refinery and as a first mortgage against the distillery, and the mortgagor (the Company) covenanted that "there was no other charge or mortgage against the mortgaged premises except that of the Tata Bank against the sugar refinery." The mortgage to the plaintiffs was registered in pursuance of the provisions of the Indian Companies Act of 1913 on 21st November, 1922, the time for registration having been extended, under section 120 of that Act, by an order of the High Court of Calcutta, dated 14th November, 1922.

On the same day, *viz.*, 10th August, 1922, the Company executed a mortgage in favour of the Tata Bank (hereinafter called the Bank), the premises comprised in the mortgage being the refinery and the machinery attached thereto in which the plaintiffs held a second mortgage. The mortgage to the Bank was registered under the Companies Act on 22nd December, 1922, the time for registration having been extended, under section 120 of that Act, by an order of the High Court at Calcutta, dated 6th December, 1922. That order extending the time for registration expressly stated that it (the order) was to be "without prejudice to the rights of any mortgagee accrued in the meantime".

Held, that the Court having extended the time for registration of the Bank's mortgage, and the mortgage having been registered within that time, the mortgage was constituted a valid charge *ab initio, i.e.,* from the date of its execution, *viz.,* 10th August, 1922, subject only to such conditions as were imposed by the Court in the order which extended the time; and that, as, on the face of the plaintiff's mortgage, it was only a second charge upon the refinery, the reservation in the order of 6th December, 1922, extending the time for registration of the Bank's mortgage that the order should be "without prejudice to the rights of any mortgagee accrued in the meantime" could not have been intended to convert the plaintiffs' second mortgage upon the refinery into a first charge thereon and that the said order had not the effect of interfering with the priority of the Bank's mortgage upon the refinery over the plaintiffs' mortgage therein.

The right which the plaintiffs had to enforce their mortgage against the property of the Company depended not only upon the registration but also

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*P.C. Appeal No. 9 of 1928. 12th December, 1929.
Oudh Appeal No. 28 of 1926.

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on the terms of the mortgage itself, and the right which they had to enforce in respect of the refinery was a second charge only.

Section 109 of the Companies Act, which requires a mortgage coming within its terms to be registered in a particular manner and within a fixed time, does not avoid a mortgage not so registered absolutely, but only so far as any security is given thereby on the Company's property or undertaking. The effect, therefore, is that if a mortgage is not registered it is valid as an admission of debt, but as against a creditor or the liquidator it could not be said that a valid charge on the Companies' property had been created.

Where an order under section 120 of the Companies Act extending the time for registration of a mortgage stated that the order was to be "without prejudice to the rights of any mortgagee accrued in the meantime," *held*, that the expression "in the meantime" in the order must be taken to mean the period between the date when the said mortgage should have been registered and the date of actual registration.

Appeal No. 9 of 1928 from a judgment and decree dated the 29th November, 1926, of the Chief Court of Oudh (Stuart, C.J. and Wazir Hasan, J.), which partly affirmed and partly reversed a judgment and decree, dated the 9th December, 1925, of the Subordinate Judge of Unao.

The material facts of the case for purposes of the present report are sufficiently fully set out in their Lordships' judgment.

The following are extracts from the mortgage deed, dated the 10th August, 1922, executed by the Pioneer Mills, Ltd., in favour of the plaintiffs (Bilas Rai Hardat Rai):—

"In consideration of rupees four lakhs already received by the Company the mortgagor Company doth hereby grant, convey and mortgage the premises known as the Sugar Refinery at Unao and the Distillery including engines, boilers, sugar manufacturing machinery and distillery together with godown quarters, manager's bungalow, out-houses and other buildings appurtenant thereto and also all lands and landed property in any way attached to or considered to be part or parcel of the said Distillery and Sugar Refinery situated at Unao.

"Whereas the mortgagor agrees to repay the said loan of rupees four lakhs with interest at eight per cent. per annum within a period of one year to the mortgagee and the mortgagee to hold the said mortgaged premises and every one of them and every part thereof respectively as to the said mortgaged premises by way of security in lieu of principal and interest at the aforesaid rate. It is further stipulated that this mortgage deed will be treated as a second mortgage against the Sugar Mills and the first mortgage against the Distillery. . . . The mortgagor covenants that there is no other charge or mortgage against the mortgaged premises except that of the Tata Bank against the Sugar Refinery."

The order of the High Court, Calcutta, dated 6th December, 1922, referred to in their Lordships' judgment, was in the following terms:—

"Upon reading a petition of the Tata Industrial Bank, Ltd., of Cawnpore and an affidavit of Sham Soonder Burman in verification thereof affirmed on the 5th day of December instant filed this day and upon hearing Mr. N. Bose, the attorney for the said petitioner,

"It is ordered under section 109 [? section 120—K.J.R.] of the Indian Companies Act, 1913, that the time to file with the Registrar of

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Joint Stock Companies, Bengal, a deed of mortgage, dated the 10th August, 1922, executed by the above-named Company in favour of the said Bank and the particulars thereof, be extended for three weeks from the date hereof *and this order* is to be without prejudice to the rights of any mortgagee accrued in the meantime."

Upjohn, K.C. and *Dube* for appellants.

Dunne, K.C. and *Swords* for respondents.

12th December, 1929. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by the plaintiffs against a judgment and decree of the Chief Court of Oudh, dated the 29th of November, 1926, which partly affirmed and partly reversed a judgment and decree of the Subordinate Judge of Unao.

The plaintiffs are the representatives of Bilas Rai Hardat Rai, a mercantile firm of Nayaganj, Cawnpore. The defendants were the Pioneer Mills, Ltd., and the respondent firm Radha Kishen Moti Lal Chamaria.

The Pioneer Mills, Ltd. (hereinafter called the Company), was registered under the Indian Companies Act, 1913, and carried on the business of sugar manufacturers; the factory was at Unao and the head office was in Calcutta.

Radha Kishen Moti Lal Chamaria (hereinafter called the defendant firm) carried on their business in Calcutta.

The main question in this appeal is whether a mortgage, dated the 31st August, 1922, executed by the Company in favour of the defendant firm, ever took effect as a valid security, the plaintiffs alleging that there was no consideration in respect thereof.

The learned Subordinate Judge found in favour of the plaintiffs on this issue.

The plaintiffs' suit was for the recovery of 4 lakhs of rupees principal and Rs. 18,666 interest on a mortgage, dated the 10th of August, 1922, executed by the Company in favour of Bilas Rai Hardat Rai.

The learned Subordinate Judge made a decree in favour of the plaintiffs for the sum of Rs. 2,68,000 and interest thereon, and directed that the plaintiffs should withdraw that amount from the monies held in deposit by the Imperial Bank of Calcutta. The Company was in liquidation and the said monies in deposit represented the proceeds of the sale of the Company's assets.

The defendant firm appealed to the Chief Court of Oudh; the plaintiffs also appealed against that part of the Subordinate

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Judge's decree which disallowed a portion of the plaintiffs' claim on their mortgage.

Both appeals were allowed by the Chief Court, and it was directed that the plaintiffs' claim—

"Be and is hereby decreed for Rs. 4,18,666-10-0 (Rupees four lakhs eighteen thousand six hundred and sixty-six and annas ten) only with 8 per cent. per annum interest from 15th of March, 1923, till realization against the liquidators, defendant No. 1, subject to the prior incumbrance in favour of Radha Kishen Moti Lal Chamaria, defendant No. 2, under the deed of mortgage, dated 31st of August, 1922."

No question arises in this appeal as to the amount due to the plaintiffs on their mortgage. The appeal is against that part of the decree which directed that the plaintiffs' claim should be subject to the prior incumbrance in favour of the defendant firm under the mortgage of the 31st August, 1922.

It appears that the liquidation of the Company was in consequence of an application made by the Company on the 9th of April, 1923, to the High Court at Calcutta, which made an order on the 4th June, 1923, for the winding up of the Company. The Company and the liquidators are not parties to this appeal.

The material facts are as follows:—

On the 10th August, 1922, the Company executed a mortgage in favour of the plaintiffs to secure a sum of four lakhs and interest at 8 per cent. per annum. The property comprised in the mortgage was the sugar refinery at Unao and the distillery, including engines, machinery, buildings and lands, considered to be part and parcel of the said sugar refinery and distillery.

It was stipulated that the mortgage should be treated as a second mortgage against the sugar mills (which it was agreed meant the refinery), and as a first mortgage against the distillery.

The above-mentioned mortgage was not registered in pursuance of the provisions of the Indian Companies Act of 1913 until the 21st of November, 1922. The time for registration was extended by an order of the High Court at Calcutta, dated the 14th of November, 1922, for three weeks from the date of the order.

On the same day, viz., the 10th of August, 1922, the Company executed a mortgage in favour of the Tata Industrial Bank, Ltd. (hereinafter called the Bank). It recited that the Bank had agreed to open a cash credit loan account to the extent of five lakhs of rupees, and in consideration of the advances

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to be made and as security for the repayment of all monies from time to time owing to the Bank in respect of the said account, the Company pledged and hypothecated to the Bank all the stocks of gum, sugar, molasses, coal, gunny bags and other articles from time to time on the premises of the Company's refinery at Unao or at any other place which might be used as a godown. In further consideration of the said advances the Company mortgaged the immoveable property and machinery mentioned in Parts I and II of Schedule B, the whole of which were declared to be free from incumbrances.

The premises thus mortgaged were the refinery and the machinery attached thereto. It was on these premises that the plaintiffs held a second mortgage.

The Bank's mortgage contained a provision that the Company should always maintain a margin of 25 per cent. between the sum owing to the Bank and the open market value of the stocks thereby pledged, and a further provision that if the Company when called upon to maintain such margin, failed to do so within 14 days after notice in writing, it should be lawful for the Bank to sell and dispose of by public auction or private sale all or any part of the stocks thereinbefore mentioned.

The above-mentioned mortgage in favour of the Bank was not registered under the Companies Act until the 22nd of December, 1922. The time for registration had been extended by an order of the High Court at Calcutta, dated the 6th of December, for three weeks from the date of the order.

It will be necessary to refer to the terms of this order in detail when another part of this case comes to be considered.

[Their Lordships discuss the evidence and conclude]

For these reasons their Lordships are of opinion that the arrangement made on the 31st August, 1922, between the Company and the defendant firm, of which the defendant firm's mortgage was part, was never carried out, and that the arrangement made between the Bank and the defendant firm in April, 1923, was a transaction of an entirely different nature and on different terms, to which the Company were not parties, and from which the Company obtained no benefit.

They are, therefore, of opinion that there was no consideration in respect of the mortgage in favour of the defendant firm, dated the 31st of August, 1922.

The result is that their Lordships are unable to agree with that part of the decree of the Chief Court, dated the 29th of November, 1926, which directed that the plaintiffs' claim should

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be subject to the prior incumbrance in favour of the defendant firm under the mortgage of the 31st of August, 1922.

There is, however, a further matter to be considered. The learned counsel for the plaintiffs argued that, although the defendant firm by means of the assignment became entitled to the security held by the Bank, which included a mortgage over the refinery, the plaintiffs' mortgage, which was on both the refinery and the distillery, had priority over the Bank's mortgage, even though the two mortgages were executed on the same day, viz., 10th August, 1922, and the terms of the plaintiffs' mortgage expressly stated that the plaintiffs' mortgage should be treated as a second mortgage against the sugar mills, *i.e.*, the refinery. The basis of the learned counsel's argument was that whereas the plaintiffs' mortgage was registered in pursuance of the Indian Companies Act of 1913 on the 21st November, 1922, the Bank's mortgage was not registered until the 22nd December, 1922, and that the order of the High Court of Calcutta of the 6th December, 1922, by which the time for registering the Bank's mortgage was extended, provided that the order should be without prejudice to the rights of any mortgagee accrued in the meantime.

It was argued that by registering their mortgage on the 21st of November, 1922, the plaintiffs acquired a right which they did not possess before, and consequently that such right could not be prejudiced by the subsequent order of the High Court or by the registration of the Bank's mortgage in pursuance of the said order.

The order of the High Court was made under section 120 of the Indian Companies Act. The reference to section 109 in the order is an obvious mistake.

Section 109 is as follows:—

"Every mortgage or charge created after the commencement of this Act by a Company and being either— . . . (*c*) a mortgage or charge on any immoveable property, wherever situate, or any interest therein: shall, so far as any security on the Company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the Company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the Registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable."

Section 120 is as follows:—

"The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or

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misstatement of any particular with respect to any such mortgage or charge was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the Company, or that on other grounds it is just and equitable to grant relief, may, on the application of the Company or any person interested, and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified, and may make such order as to the costs of the application as it thinks fit."

By the terms of section 120 the Court, when extending the time for registration, has a discretion to impose such terms and conditions as it thinks just and expedient, and the material words of the order in this case are "without prejudice to the rights of any mortgagee accrued in the meantime."

The phraseology of the order is not very precise, but their Lordships assume that "in the meantime" must be taken to mean the period between the date when the Bank's mortgage should have been registered and the date of actual registration. This period would cover the 21st November, 1922, when the plaintiffs' mortgage was registered.

Section 109 provides that a mortgage, such as the Bank's mortgage of the 10th August, 1922, shall so far as any security on the Company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the Company unless the prescribed particulars are filed with the Registrar within 21 days after the date of its creation.

It is to be noted that the section does not avoid the mortgage absolutely, but only so far as any security is given thereby on the Company's property or undertaking.

The effect, therefore, is that if a mortgage is not registered it is valid as an admission of debt, but as against a creditor or the liquidator it could not be said that a valid charge on the Company's property had been created.

But it is provided by section 120 that the Court may extend the time for registration in a proper case, as was in fact done in this case. What, then, was the effect of the registration of the Bank's mortgage within the extended time?

In their Lordships' opinion, the Court having extended the time for registration, and the mortgage having been registered within that time, the mortgage was constituted a valid charge *ab initio, i.e.*, from the date of its execution, viz., the 10th of August, 1922, subject only to such conditions as were imposed by the Court in the order which extended the time.

If that be so, the Bank's mortgage on registration became a valid charge on the refinery as from the 10th August, 1922,

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and the plaintiffs' mortgage of the 10th August, 1922, which also was registered within the time extended by the High Court, became a valid charge from the 10th August, 1922, on the refinery and the distillery; but on the face of the plaintiffs' mortgage it was only a second charge upon the refinery.

But it was said on behalf of the plaintiffs that a right to enforce their mortgage had accrued to them on the registration of the mortgage on the 21st November, 1922, and by the order of the Court such right was not to be prejudiced. The right which the plaintiffs had to enforce their mortgage against the property of the Company depended not only upon the registration but also on the terms of the mortgage itself, and the right which they had to enforce in respect of the refinery was a second charge only. The order of the Court of the 21st December, 1922,* that it should be without prejudice to the "rights of any mortgagee accrued in the meantime," in their Lordships' opinion, could not have been intended to convert the plaintiffs' second charge upon the refinery into a first charge thereon.

The learned counsel for the plaintiffs-appellants, in support of his argument, referred to the decision in *In re Monolithic Building Co. Tacon* v. *The Company*,[1] which decided that section 93 of the Companies (Consolidation) Act, 1908, avoids an unregistered mortgage as against a subsequent registered incumbrancer, even though he had express notice of the prior mortgage at the time when he took his own security.

The facts of the present case are materially different from the facts of the cited case, especially by reason of the fact that the plaintiffs' mortgage contains an express term that it is a second charge on the refinery. Further, the learned Judges who decided the cited case seem to have dealt with it "in reference to the difference of position between a registered secured creditor and a prior unregistered secured creditor.". See judgment of Cozens Hardy, M.R. at page 662, and the effect of the subsequent registration of the prior creditor's security within the time extended by the Court does not seem to have been considered.

Their Lordships are of opinion that there is nothing in the order of the High Court of the 6th December, 1922, which interfered with the priority of the Bank's mortgage upon the refinery over the plaintiffs' mortgage therein.

1. (1915) 1 Ch. 643.

*The order, though bearing date the 21st December, 1922, was made on the 6th December, 1922.—*K.J.R.*

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Their Lordships, therefore, are of opinion that the appeal should be allowed on the ground that there was no consideration for the mortgage of the 31st August, 1922, in favour of the defendant firm, but they are further of opinion that the Bank's mortgage of the 10th August, 1922, which was assigned to the defendant firm, has priority over the plaintiffs' mortgage in respect of the property comprised in the mortgage so assigned to the defendant firm.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *J. J. Edwards & Co.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Kottakota Venkatarami Reddi .. *Appellant** (*Deft.*)

v.

Sri Maharaja Seetharama Bhupal Rao (dead) and others .. *Respondents* (*Plff. and L.Rs.*).

Venkatarami Reddi *v.* Sri Maharaja Seetharama Bhupal Rao.

Civil Procedure Code (*V of* 1908), *S.* 84—*Foreign State—What is—Attributes of sovereignty—Negotiable Instruments Act* (*XXVI of* 1881), *Ss.* 4 *and* 5—"*Certain person*"—*Promissory note executed in favour of a person described by his office—Validity—Conflict of laws—Unstamped promissory notes inadmissible by the* lex loci contractus—*Admissibility in British India.*

Any State which has preserved any degree of sovereignty must have at least three characteristics before it can properly be called a sovereign State. First, the people of the territory concerned must owe allegiance to the ruler of the supposed State. Secondly, the laws enforced in the State must be the ruler's laws, either made or recognised by him, not imposed by any outside authority, nor laws made by him in virtue only of a delegated authority. Thirdly, these laws should be enforced by his Courts, that is, Courts deriving their authority from him and not subject to the judicial control of any outside authority.

Held, on the evidence before the Court, that Gadwal Samasthanam, the head of which was the plaintiff in the suit, was in no sense a sovereign State or a "foreign State" for the purpose of S. 84 of the Code of Civil Procedure.

A promissory note executed in favour of the "Mohathameem Sahib Garu of Gadwal Samasthanam" is one in favour of a "certain person" within the meaning of S. 4, read with the last part of S. 5, of the Negotiable Instruments Act.

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*Appeal No. 192 of 1924. 13th February, 1930.

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Mahant Damodar Das v. *Benares Bank, Ltd.,* (1920) 5 Pat. L.J. 536 and *Ramanadhan Chetty* v. *Katha Velan,* (1917) I.L.R. 41 Mad. 353: 33 M.L.J. 627, followed.

The suit was brought upon certain promissory notes executed by the defendant in H.E.H. the Nizam's Dominions. Not having been stamped, they were not admissible in evidence even on payment of a penalty under the law in force in the Nizam's Dominions. It was contended by the defendant in the suit that the documents were void and unenforceable.

Held, the result of the provision in the foreign statute was only to make them inadmissible in evidence in the Nizam's Courts and not void; and that they could be sued upon in British India.

Dhondiram Chatrabhuj v. *Sadasuk Savatram,* (1918) I.L.R. 42 Bom. 522 and *Bristow* v. *Sequeville,* (1850) 5 Ex. Rep. 275, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Kurnool in O.S. No. 34 of 1922.

The appeal was originally heard by Devadoss and Mackay, JJ., who delivered the following judgment:—

The suit is by the proprietor of Gadwal Samasthanam for an amount due by the defendant. The Lower Court decreed the suit and the defendant has preferred this appeal. In his written statement, the defendant pleaded that "the plaintiff being of a foreign State and the subject-matter of the suit being one relating to the State revenue of that State, the plaintiff has no right to institute this suit in this Court." The plaintiff relied on section 84 of the Civil Procedure Code as enabling him to file the suit. Section 84 applies to cases of foreign States recognised by His Majesty or by the Governor-General in Council. In order to enable a foreign State to sue in a British Court, two conditions have to be fulfilled: (1) the foreign State must be recognised by His Majesty or by the Governor-General in Council, and (2) the object of the suit must be to enable a private right vested in the head of such State or in any officer of such State in his public capacity. Though the Lower Court acted on the representation of the plaintiff, that section 84 applied to the case and granted a decree, yet as section 84 casts upon the Court the duty of taking judicial notice of the fact that a foreign State has or has not been recognised by His Majesty or by the Governor-General in Council, we referred the matter to the Government and the information we received is that section 84 of the Civil Procedure Code does not apply to Gadwal Samasthanam in Hyderabad State. We hold, section 84 has no application to the present case. The defendant's contention that Gadwal Samasthanam is a foreign State is a question of fact and this question of fact has not been tried by the Lower Court. It is but fair that the appellant should have an opportunity of adducing evidence to

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show that Gadwal Samasthanam is a foreign State and we therefore direct the Subordinate Judge of Kurnool to record a finding on the following issues:—

Is Gadwal Samasthanam a foreign State? and to submit the finding in the course of four weeks. Fresh evidence may be adduced by both the parties. Ten days for objections.

[In compliance with the order contained in the above judgment, the Subordinate Judge of Kurnool took evidence regarding the internal administration of the Samasthanam. He found it had no executive or judicial independence or legislative functions to discharge and returned a finding in these terms: "I find that Gadwal Samasthanam is not a 'State' or a 'Foreign State' and decide the issue in the negative."—*Rep.*]

W. Kothandarama Ayya for appellant.

C. S. Venkatachariar and *R. Srinivasa Aiyangar* for respondents.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—In this suit the Raja of Gadwal sued the defendant, a resident of the Kurnool district, on ten documents, which are called Shokhas. The defendant admitted liability on one of them, Exhibit K, and disputed liability on the others. The Subordinate Judge made a decree for the plaintiff for the full amount claimed. The defendant appeals.

Before the Subordinate Judge in his written statement the defendant objected to the suit on the ground that Gadwal was a foreign State and that the plaintiff was suing, not to enforce a private right, but to enforce a State right arising out of liability to pay revenue due to the State. The learned Subordinate Judge did not consider at the trial the question whether Gadwal was a foreign State. He found that the right which the plaintiff was suing to enforce was a private right. When the appeal came on for hearing in this Court, the defendant raised a rather different objection, which was not set out in his appeal memorandum, namely, that Gadwal is a foreign State, but not a foreign State recognised by His Majesty the King-Emperor or the Governor-General in Council, and so the plaintiff as the ruler of that State could not sue in British India to enforce a private right, because he did not come within section 84 of the Code of Civil Procedure. At first sight it seems not very likely that within the borders of the Indian Empire there should be a foreign State the establishment of which has not yet been recognised by His Majesty or the Governor-General in Council. But

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Reilly, J.

Mr. Kothandarama Ayya, who appears for the defendant, has urged that the Gadwal Samasthanam is a State not in direct relations with His Majesty or the Governor-General in Council, but a State under the suzerainty of the Nizam of Hyderabad. It is possible that there might be a State, not itself recognised by His Majesty or the Governor-General in Council, but subject to the suzerainty of some other State within the borders of the Indian Empire which was so recognised. But it is not disputed that, if Gadwal is to be found to be such a State, we must find that at any rate some degree of sovereignty has been preserved to it. When the case came on first before Devadoss and Mackay, JJ., they thought it was necessary to inquire of the Government whether Gadwal was a State recognised by His Majesty or the Governor-General in Council for the purpose of section 84 of the Code of Civil Procedure; and in reply to an inquiry made by the Registrar on that question a letter was received from the Chief Secretary to Government of Madras saying:

"I am directed to state that the Government of India have intimated that section 84 of the Civil Procedure Code, 1908, does not apply to Gadwal Samasthanam in Hyderabad State."

It will be seen that there are various implications in that letter, but that it does not directly meet the point raised by Mr. Kothandarama Ayya. If we received through the regular official channel any intimation in regard to the relations of a foreign State with His Majesty or with the Governor-General in Council or any statement that a foreign State had or had not been recognised by His Majesty or the Governor-General in Council, I need hardly say that we should accept that intimation as conclusive. But in this case it happens that the answer to the inquiry made does not conclude the contention raised by the defendant. Having received that answer, Devadoss and Mackay, JJ., thought it well to frame an issue: "Is Gadwal Samasthanam a foreign State" and send it to the Subordinate Judge for a finding. The Subordinate Judge after taking further evidence has submitted a finding that Gadwal Samasthanam is not a "State" or a "foreign State." The defendant has raised objections to that finding and has urged before us that Gadwal is a State, a foreign State, but not one recognised by His Majesty or the Governor-General in Council, and that therefore the plaintiff as the ruler of that State could not bring this suit in a Court in British India.

The position is rather curious because the defendant is trying to thrust upon the plaintiff an honour which the plaintiff

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does not claim. The plaintiff maintains that the Raja of Gadwal is a subject of the Nizam of Hyderabad, a subject indeed with a long and very distinguished history behind him, a subject in a very special position, a subject with special rights and privileges and exercising some of the powers usually exercised by ruling sovereigns, such as the rights of escheat and warship, the right to hold Judicial Courts, but nevertheless a subject, not a sovereign. We must remember that in many parts of the world such powers as I have just mentioned have been exercised by subjects in feudal or *quasi*-feudal relations with their sovereigns; but nevertheless their legal position has been that of a subject. In the circumstances of this case it does not appear necessary to me to enter into elaborate discussion of the character and essence of sovereignty. But I think it cannot be denied that any State which has preserved any degree of sovereignty —and various attributes of sovereignty may have been ceded to their suzerains by different States—must have at least three characteristics. First, the people of the territory concerned must owe allegiance to the ruler of the supposed State, and in the term "ruler" I include any person in whom, or body in which, the sovereign power resides. Secondly, the laws enforced in the State must be the ruler's laws, either made or recognised by him, not laws imposed by any outside authority, nor laws made by him in virtue only of a delegated authority. And thirdly, those laws must be enforced by his Courts, that is Courts deriving their authority from him and not subject to the judicial control of any outside authority. Mr. Kothandarama Ayya in the course of his argument referred to Federated States. What I have said in regard to the power of law-making does not relate directly to Federated States; but I do not think it is in any way in conflict with the position of a body of Federated States. A group of co-ordinate sovereign States can agree together that the whole body shall make laws which are to run in the territory of each member; but those laws are made not by any external authority but by virtue of authority derived from the sovereign members themselves.

If we look at the evidence regarding the laws which run in Gadwal and the Judicial Courts which are established there, we shall find, I think, no difficulty in deciding the question before us. Diwan Bahadur Aravamudu Aiyangar, an Advocate of this Court, whose father was a judicial officer of the Gadwal Samasthanam and who himself had been legal adviser of the Samasthanam for nearly 30 years, has given evidence as

P.W. 5. He states that the Raja of Gadwal has no legislative power; and he has also given evidence to the effect that the Nizam's laws run in the Gadwal territory, instancing the Nizam's Criminal Procedure Code and the Nizam's Land Revenue Act. D.W. 3, a vakil called by the defendant, has stated that Gadwal is governed by the laws prevailing in the Nizam's State and that there is no independent power in the Gadwal Samasthanam to frame laws. In regard to Courts, Mr. Aravamudu Aiyangar has stated that judicial officers in Gadwal are nominated by the Raja but not appointed by him: they are appointed by the authorities of the Nizam's State. He has also stated that for more than 30 years there has been a right of appeal from the Courts of Gadwal to the Nizam's Courts—it must be noticed, not to the Nizam as suzerain in any political or executive capacity, but to the Nizam's Courts. The defendant himself as D.W. 2 has made a similar statement regarding the position of the Gadwal Courts. I think that evidence is quite conclusive to show that the Gadwal Samasthanam is in no sense a sovereign State or a foreign State for the purpose of section 84 of the Code of Civil Procedure.

Besides this objection to the maintainability of the suit, the defendant has urged a number of points in regard to the Shokhas before us. The learned Subordinate Judge has treated all the 9 Shokhas in dispute as promissory notes. But I think it is quite clear, when they are examined, that all except three of them are not promissory notes. Exhibits A, B and H do contain unconditional promises to pay for a certain consideration named, that is trees assigned. But the other Shokhas except Exhibit K are offers for date trees. I think it will be convenient to deal first with the Shokhas which are promissory notes, Exhibits A, B and H. The defendant maintains that there was no consideration for these notes. But consideration is recited in them. In the ordinary way it is for him to prove want of consideration. He is a witness whose evidence does not read in a very convincing way, and the attitude he has taken up in this suit has shifted from time to time. The learned Subordinate Judge has not believed him on this point. I can see no sufficient reason why we should differ from the Subordinate Judge as regards that.

But apart from the question of consideration Mr. Kothandarama Ayya has urged other points. One is that the defendant executed these notes only as the agent of another man called Rangayya. There is nothing whatever in Exhibit A to suggest that the executant was anybody but the defendant him-

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self or that he was acting for anybody else. Nor is there in Exhibits B and H as they appear before us. But unfortunately part of the paper on which Exhibits B and H have been written appears to have been torn or cut off just below the defendant's signature. It is suggested for the defendant that under his signature on these notes he wrote some words to indicate that he was the agent for Rangayya. It is a suspicious thing that the paper should have been torn off below the signature in these notes. An allegation was made before the Subordinate Judge that the notes had been tampered with while they were in the Subordinate Judge's Court. The clerk of the plaintiff's vakil filed an affidavit that they were not torn in that way when he put them into Court. The learned Subordinate Judge made an inquiry with the aid of affidavits into the matter but was unable to come to any conclusion. But, because the paper on which the notes were written has been torn or cut off in this way, can we accept the defendant's statement that he signed as agent for Rangayya? His own evidence in the matter is extraordinarily halting. He says:

"I do not well remember if in the suit Shokhas I had written anywhere that I was Rangayya's agent. I remember in some Shokhas which I executed for him I mentioned that I was agent. Some of the suit Shokhas were in full paper when I executed them. Exhibits B, H, J and D were in fuller paper when I executed them. Below my signature in Exhibit J some letters are missing in the part found torn. The letter that appears now is 'a'; the missing word should be agent. In Exhibit D I similarly find the yethvam of Ye Rangayya."

Then he goes on to explain that in the other notes "out of laziness and because plaintiff and his Abkari Superintendent were aware that I was Rangayya's agent I failed to mention in the rest that I executed them as Rangayya's agent." But it will be seen that he does not say specifically that in the case of Exhibit B or in the case of Exhibit H he signed as agent. When we look at these notes themselves it does not appear at all probable that he did so. Each of them is headed, as indeed all these Shokhas are, "Shokha executed by Kothakota Venkatarami Reddi," that is the defendant. There is no suggestion there that it was executed for anybody but himself. It has also to be noticed that, when a lawyer's notice was sent to him, in his reply he said that the claim was false, but he did not say that he executed any of the Shokhas in question as agent for Rangayya. In these circumstances I think that the contention that Exhibits B and H were executed only as agent for Rangayya clearly fails.

Another objection taken for the defendant is that these three promissory notes are made in favour of the "Mohatha-

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meem Sahib Garu of Gadwal Samasthanam," that is the officer holding that post, and not in favour of any person by name. It is contended that to make a note in favour of a person described by his office is not to make it in favour of a certain person as required by section 4 of the Negotiable Instruments Act. But in *Mahant Damodar Das* v. *Benares Bank, Ltd.*[1] it was decided that a promissory note made in favour of "the manager or acting manager of the Benares Bank, Ltd." was properly made and the person who was certainly indicated was the Benares Bank. Following that I am quite prepared to find that these promissory notes were executed in favour of the Raja of Gadwal, sufficiently described through his officer by the name of the office. It must be remembered that in this country we have the last part of section 5 of the Negotiable Instruments Act to help us in this matter, which provides that, if it is clear to whom payment is to be made, he may be a "certain person" within the meaning of section 4 of the Act although he is misnamed or only designated by description. In *Ramanadhan Chetty* v. *Katha Velan*[2] it was held that a note drawn in favour of a trustee of a temple by name and office was really in favour of the trust and could be sued on by a successor of the trustee. In my opinion this objection also fails.

Another objection to these notes is that none of them is stamped, though they were all executed in the Nizam's Dominions where promissory notes must be stamped in a manner similar to the way in which they have to be stamped in British India. The result of this is that none of these three notes could have been admitted in evidence according to the Negotiable Instruments Act in force in the Nizam's Territories to prove the plaintiff's claim. It appears that there is a provision in the Negotiable Instruments Act of the Nizam's Dominions that, although other documents which have not been stamped at the time of execution may be made admissible in evidence by paying a fee or penalty, the defect of want of stamp cannot be cured in that way in the case of promissory notes. Mr. Kothandarama Ayya suggests that the result of that is that these notes were void in the Nizam's territories. But that is not what the Act says. It merely makes them inadmissible in evidence. If they were void in the Nizam's Dominions, the place where they were made, certainly they could not be used as the basis of a suit instituted in British India. But, if they

1. (1920) 5 Pat. L.J. 536.
2. (1917) I.L.R. 41 M. 353: 33 M.L.J. 627.

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are merely inadmissible in evidence in Courts in the Nizam's Dominions because they are not stamped, it does not follow that they are inadmissible in Courts in British India. A note made in British India and unstamped would be inadmissible in our Courts; but we cannot stretch the provisions of our Negotiable Instruments Act to exclude on that basis a promissory note executed in a foreign territory. This particular point came before the Bombay High Court in *Dhondiram Chatrabhuj* v. *Sadasuk Savatram*[3] and it was there decided that a promissory note made in the Nizam's Dominions, but unstamped and so inadmissible in evidence in any of the Nizam's Courts, could be proved in a Court in British India. That is the principle which has been adopted in England, as may be seen from *Bristow* v. *Sequeville*[4] I cannot agree with Mr. Kothandarama Ayya's contention that because these promissory notes being unstamped could never have been admissible in any of the Nizam's Courts and so were practically unenforceable in his territory they must be regarded as void. That is not, so far as I can see, the effect of the penalty imposed in the Nizam's territory for failure to stamp them.

So far in regard to Exhibits A, B and H. There remain the other six Shokhas. These are, as I have said, in the form of applications for date trees, apparently required for the purpose of drawing toddy. They are offers for date trees and promises to pay certain amounts in certain periods. For the defendant it is contended that they are mere offers, that, though on the back of each paper there is an endorsement saying that it was accepted, no such acceptance was ever communicated to the defendant and that therefore he is not bound by the documents at all. On the other hand, Mr. Venkatachariar for the plaintiff contends that there is evidence that the right to tap date trees was given in consequence of these applications to the defendant's knowledge and therefore there was acceptance by performance and he got consideration for these documents and is bound by them. All these six documents refer to date trees required for the "Rajavole mamla Savukattu," which we are told means trees required for the toddy-tapping lease in the Rajavole village. There is the evidence given by P.W. 4, which combined with that of D.W. 1 shows sufficiently, I think, that the lease of trees for toddy tapping in the Rajavole village for Fasli 1329 was granted to Rangayya and a man called Thimma Reddi, who is a brother of the defendant. If the defendant

3. (1918) I.L.R. 42 B. 522. 4. (1850) 5 Ex. Rep. 275.

applied for trees for the purpose of that lease and the lease was granted to Rangayya and Thimma Reddi, we can hardly suppose that the defendant was not aware of that. I think that the defendant must be held liable on any of these six Shokhas I am now discussing which can be shown to relate distinctly to the lease of trees in Rajavole for Fasli 1329. Exhibits D, E, F and G by their dates must refer to trees required for that Fasli. Ex. C is dated the 19th of November, 1920, that is about a fortnight after the expiry of the Fasli, and Exhibit J is dated 13th October, 1920, about 16 days before the end of Fasli. It is obvious that Exhibit C cannot refer to Fasli 1329 at all; nor can we reasonably suppose that Exhibit J refers to trees required for that Fasli, as it is a promise to pay Rs. 1,125 for a very large number of trees, which could be used only for a few days if it were for Fasli 1329. Exhibits C and J must, I think, refer to the succeeding Fasli, and we cannot find from the evidence who got the lease for that Fasli. Possibly the defendant himself was applying for it; but there is no evidence who got the lease. I think therefore that we cannot say that the offer made in Exhibit C or the offer made in Exhibit J was accepted to the knowledge of the defendant or that trees were let in accordance with them, and therefore the plaintiff's claim in respect of these two documents must be dismissed. Of the remaining Shokhas Exhibits D, E, F and G, Exhibit D is torn in a manner similar to Exhibits B and H, and the defendant takes advantage of that to urge that he only acted as an agent in connection with Exhibit D. But that contention, I think, fails, as it did in respect of Exhibits B and H.

In my opinion, therefore, this appeal should be allowed in respect of the amounts concerned in Exhibits C and J, but in other respects should be dismissed and in the circumstances the parties should pay and receive proportionate costs throughout.

Kumaraswami Sastri, J.—I agree.

S.R. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice* AND MR. JUSTICE CURGENVEN.

Vatrapu Subbarao *alias* Pamireddi Subbareddi and others .. *Appellants** (*Plffs.* 2 *to* 7)

v.

Pamireddi Mahalakshmamma .. *Respondents* (*Defts.* 1 *to* 3).

Subbarao *v.* Mahalakshmamma.

Indian Registration Act (*XVI of* 1908), *Ss.* 17 (*b*) *and* 49—*"Share list"—Deed of partition or memorandum of division—Necessity of registration—Admissibility to show divided status—Hindu Law—Illatom relationship—Burden of proof—Incidents of—Status of son-in-law—Right to interdict alienation.*

The question whether a document is a deed of partition or a mere memorandum of partition is a pure question of fact, to be decided on a perusal of the actual document.

Veerappan v. *Mylai Udayan,* (1924) 87 I.C. 285 and *Ayyakutti Mankondan* v. *Periaswami Koundan,* (1913) 30 M.L.J. 404, referred to.

An unregistered document styled a "share list" set out "particulars of the immoveable property which fell to the share of one member" in the division of the family properties effected between two brothers. It was of the same date as the alleged oral agreement to divide.

Held, the document was intended to be evidence of partition and not being registered, was not admissible in evidence to prove the partition in so far as it affected immoveable properties.

Per *Curgenven, J.*—"The document says 'particulars of the immoveable property, etc.' . . . . If it had said, 'we hereby declare that the following are the particulars of the immoveable property, etc.,' no doubt could be entertained as to its nature, and since it is in substance and intention a declaration to that effect, it must, I think, be deemed to operate within the meaning of S. 17."

It is nevertheless admissible for the purpose of explaining the nature and character of the possession held by a party or as evidence of a divided status which can be dissociated from and does not necessarily imply a division of property.

Case-law reviewed.

Claims based on an *illatom* relationship should be carefully scrutinised. The practice is a departure from ordinary Hindu Law, and accordingly it lies upon the party claiming by virtue of the status to override the provisions of that law, to substantiate his claim. The incidents of this relationship are still in the making and in the absence of any evidence in that respect there is no warrant from the authorities available, for the view that the *illatom* has, during the life-time of his father-in-law such an interest in the latter's property as would give him a right to interdict alienation and devise. *Chenchamma* v. *Subbaya,* (1885) I.L.R. 9 M. 114 and *Sooramma* v. *Varahalu,* (1926) 101 I.C. 828, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam, dated 19th December, 1927, in Original Suit No. 100 of 1926.

The Advocate-General (*A. Krishnaswami Aiyar*) and *Ch. Raghava Rao* for appellants.

S. Varadachariar, V. Govindarajachari and *S. Subramania Sastri* for respondents.

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*Appeal No. 116 of 1928. 27th March, 1930.

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Beasley, C. J.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—Plaintiffs 2 to 7 are the appellants. The 1st plaintiff died after the suit was filed. The 1st defendant is the wife of Sambayya, the deceased brother of the 1st plaintiff, and the 2nd defendant is the son-in-law of Sambayya having married Suramma, his fourth daughter. The 1st plaintiff and Sambayya were formerly members of an undivided Hindu family in possession of large properties. It is alleged in the plaint that Sambayya managed the family property and that he died an undivided member of the family on the 24th November, 1925. He was at the time of his death the Village Munsif of Dokiparru. One of the questions to be decided in this appeal is whether the 1st plaintiff and Sambayya became divided or not. Neither the 1st plaintiff nor Sambayya had any male issue. They had only daughters. It is alleged in the plaint that after the death of Sambayya the entire property of the joint family devolved upon the 1st plaintiff by right of survivorship. It is alleged that the 1st and 2nd defendants nevertheless took possession of the joint family property and a decree is sought establishing the right of plaintiffs 2 to 7 and the 3rd defendant to enjoy the property set out in Schedule A and a permanent injunction is claimed restraining the 1st and 2nd defendants from causing obstruction to the enjoyment of plaintiffs 2 to 7 and the 3rd defendant in this property and other reliefs. The plaintiffs, therefore, base their claim on a right to enjoy the undivided property of the 1st plaintiff and Sambayya. To meet this case the defendants set up the plea that Ramayya (the 1st plaintiff) and Sambayya were divided members and that the share of Sambayya did not pass to the 1st plaintiff after his death by right of survivorship. It is alleged that a partition was effected in November, 1924, between Sambayya and Ramayya and that share lists showing a division of the properties were prepared at Bunder on the 9th November, 1924 and in para. 5 of the written statement the items which fell to the share of Sambayya are set out. At this time Sambayya was very ill and he died on the 24th November, 1925. Before he died it is alleged that he made a will at Bunder disposing of the property which fell to his share in the partition. The date of this alleged will is the 26th February, 1925. Under the terms of this document, Exhibit VII, 15 acres of land passed to his daughters, 12 acres under a codicil of the same date to the 2nd defendant, some 5 acres of land and godowns to a temple and the residue to one Koti Reddi, who was the son of the 2nd defendant and whom it is alleged by the defendants Sambayya adopted.

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Sambayya's second daughter, Sowbhagyam, who was a widow living in Sambayya's house was not provided for in the will. In Exhibit VII Koti Reddi is described as the adopted son of Sambayya and it is also stated in it that Sambayya had given authority to the 2nd defendant, the natural father of Koti Reddi, to act as guardian of Koti Reddi and to act as Village Munsif during his minority and to manage all his properties. The rice mill at Gudlavalleru which in the will is stated by Sambayya to be his self-acquired property was bequeathed to Koti Reddi. This alleged will—I describe it as an alleged will because it is the plaintiff's case that it is a spurious document—was attested by four witnesses, namely, Divi Rangacharyulu, a doctor who was attending on Sambayya, Pamireddi Ramayya, the 1st plaintiff, Korapati Venkatakrishnayya (D.W. 4) and another witness whose signature is illegible but who was examined as D.W. 5. It is not disputed by the plaintiffs that the signature of the 1st plaintiff is his, but it is alleged that he was an uneducated man and under the influence at this time of the 2nd defendant and that he either signed the document being unaware of its contents or the document was written on blank paper which bore the signature of the 1st plaintiff. It will be seen, therefore, that the respondent's case is that Sambayya having effected a partition with Ramayya disposed of by will the share which fell to him by reason of the partition and that, therefore, the plaintiffs have no right to any of the property of Sambayya so disposed of; and a matter of considerable importance to be considered here is whether the allegation by the defendants that the 2nd defendant's son Koti Reddi was adopted by Sambayya is true or false. It should be mentioned that the 2nd defendant's son Koti Reddi died on the 1st January, 1926. Not, however, content with setting up a defence claiming Sambayya's property, a claim for Ramayya's property is also made by reason of an alleged relationship of *illatom* son-in-law to Ramayya. The 2nd defendant, it will be remembered, married Sambayya's fourth daughter. He was, therefore, a son-in-law of Sambayya, but notwithstanding this it is the case of defendants 1 and 2 that Ramayya who had no unmarried daughters and no male issue brought up Surammal and gave her in marriage to the 2nd defendant. In the written statement of the 1st and the 2nd defendants it is stated that Sambayya and Ramayya effected an arrangement to the effect that Ramayya should take Surammal as his foster-daughter and she should be given in marriage to his sister's son, the 2nd defendant, that the latter should have a joint right to the property of Ramayya and that after the death of

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Ramayya the entire property forming the share of Ramayya should pass to him. This *illatom* relationship and the rights attaching thereto are denied by the plaintiffs. It is also alleged by the defence—and this is admitted by the plaintiffs—that whilst the suit was pending Ramayya, the 1st plaintiff, disposed of the bulk of the plaint properties, having by means of a Dhakal deed disposed of immoveable properties worth Rs. 50,000 and under another Dhakal deed properties worth Rs. 8,000. Ramayya died in July, 1926.

Several points of great importance and difficulty arise in this appeal. They are: (1) Did Ramayya and Sambayya become divided before the death of the latter? (2) Is the will, Exhibit VII, and its codicil genuine? (3) Was Koti Reddi the adopted son of Sambayya? (4) Was the 2nd defendant the *illatom* son-in-law of Ramayya? (5) If he was, to what share of Ramayya's property is he entitled? and (6) Was the rice mill in Gudlavalleru the self-acquired property of Sambayya? In considering the before-mentioned matters several difficult questions of fact and law present themselves.

In dealing with the first question what we have to consider is whether what is described by the defendants as a "share list" can be properly given that description and whether it is a deed effecting a partition as is alleged by the defendants. This question is a most important one because that document is an unregistered one. If it is a document which under the Registration Act is required to be registered, then the question arises whether it can be referred to in evidence in order to prove that there was a partition or division in status as between Sambayya and Ramayya or whether it can be disregarded altogether and parol evidence admitted to prove a division in status or partition. First of all, does this document require registration? Under S. 17 (*b*) of the Registration Act (XVI of 1908) amongst other documents required to be registered are non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immoveable property. If Exhibit VIII is a document of this description, then under S. 49 of the same Act it shall not affect any immoveable property comprised in it or be received as evidence of any transaction affecting such property unless it has been registered. Therefore the first thing to be considered is whether this is a document such as is described in S. 17 (*b*) of the Registration Act. Exhibit VIII is headed "Particulars of the immoveable

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properties which fell to the share of Pamireddi Sambayya in the division of the family properties effected on the 9th November, 1924, between the sons of Pamireddi Lakshmanna (1) Sambayya and (2) Pamireddi Ramanna's adopted son, Ramayya, residents of Dokiparru village." Then follow the survey numbers of the properties, their situation and their rough extent. This document was signed by both Sambayya and Ramayya. The writer of the document is stated to be Burra Ramayya (D.W. 3) and there are the signatures of two attesting witnesses, Nagabhushanam who was not called as a witness in the Court below and Seetaramaswami (D.W. 7). For the plaintiffs it is contended that this document operates to create an interest in the immoveable property described in it and by the defence it is contended that it is nothing more than a memorandum of a division of properties previously agreed upon. A wealth of authority upon this question has been presented to us in the course of the argument by both sides. Amongst the cases to which we were referred are the following: *Pothi Naicken* v. *Naganna Naicker*[1]. There the document in question reads as follows:—

> "As we have, in the presence of the undermentioned Panchayatdars, divided, into equal moieties, the cash, moveables and immoveables, Court decrees, etc., of which we are now possessed, valued at Rs. 80,000, our connection shall hereafter be only by relationship, but we shall have no monetary connection in respect of these properties."

It was there held by Sir John Wallis, C.J., Sadasiva Aiyar and Seshagiri Aiyar, JJ., constituting a Full Bench, that the document had the effect of causing immoveable properties heretofore held by the co-parceners as joint tenants thenceforward to be held by them as tenants-in-common and as such, without registration, could not affect immoveable property. In my view, the document in question did not create much difficulty on the face of it. It did more clearly appear to be a document effecting a partition than otherwise. The question whether a document is a deed of partition or a mere memorandum of partition is a pure question of fact to be decided on a perusal of the actual document. This was the opinion of Jackson, J., in *Veerappan* v. *Mylai Udayan*[2] and also of Spencer, J., in *Ayyakutti Mankondan* v. *Periaswami Koundan*[3]. In the former case after an award directing a partition was passed by panchayatdars a list was drawn up which contained the shares given to the different members and was signed by them and attested by witnesses. Jackson, J., held that the document was a deed of partition

1. (1915) 30 M.L.J. 62 (F.B.). 2. (1924) 87 I.C. 285.
3. (1913) 30 M.L.J. 404.

declaring an interest in the immoveable property mentioned therein and, if unregistered, was inadmissible in evidence respecting any transaction affecting such property. Jackson, J., however, thinks that at the most it will be evidence of an intention to divide and receivable in evidence as proof of such intention. The latter opinion deals with the question as to admissibility and the former as to whether it purports to create an interest in immoveable property. In *Saraswatamma* v. *Paddayya*[4] the document was described as a "List of shares of division." Lands were divided in it and then the residential house and it contained the statement: "Both of us have agreed to the said shares and effect settlement without any dispute whatever." Venkatasubba Rao, J., was of the opinion that this document afforded clear evidence of conduct from which an intention to divide on the part of the executants was deducible but that all the co-parceners not being parties to the document it did not effect an immediate division in status. With this opinion Spencer, J., agreed. On page 359 he states:

> "On the same principle I think that documents which are instruments of partition, as defined in S. 2 (15) of the Stamp Act, that is, instruments whereby co-owners of any property divide or agree to divide such property in severalty, are required by S. 17 of the Indian Registration Act to be registered when the property to be divided is immoveable property over Rs. 100 in value, and if they are not so registered they cannot by reason of S. 49 be admitted as evidence of the transaction they purport to effect; but they may be used for the collateral purpose of proving division of status among the parties to the documents. When so used they do not 'affect' immoveable property nor is the division of status a 'transaction affecting immoveable property' in the sense intended by the Act to be given to the word 'affect'. Documents that do not fall under the above description are not required to be registered at all and are admissible in evidence without registration."

The observations of Spencer, J., are useful in our consideration of the question whether and for what purpose a document inadmissible under S. 49 of the Registration Act by reason of want of registration may yet be used in evidence. In *Gopayya* v. *Kristnayya*[5] it was held by Krishnan and Venkatasubba Rao, JJ., that if the parties had treated the "Share lists" as final it would be inadmissible in evidence without registration and that an oral agreement as to partition could be proved and, if proved, the written deed could be treated as the minutes of agreement between the parties and not as a completed partition deed and even though unregistered could under these circumstances be admitted in evidence to prove the terms agreed

4. (1922) I.L.R. 46 M. 349: 44 M.L.J. 45.
5. (1922) 16 L.W. 784.

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to. In *James R. R. Skinner* v. *R. H. Skinner*[6] it was held that an agreement for the sale of immoveable property is a transaction affecting the property within the meaning of S. 17 of the Registration Act inasmuch as, if carried out, it will bring about a change of ownership and that to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appeared to be little more than an evasion of the Act. This case was strongly relied upon by the learned Advocate-General in support of his argument but when the agreement for sale is examined it will be seen that it on the face of it affected the property. In it clause 8 reads as follows:—

"The said vendor confirms this to be a complete and conclusive sale binding on the said vendor and on all his heirs or assigns, etc., in favour of the said vendee . . . . and if the vendee should ever consider necessary to execute a registered sale-deed . . . . vendor or his heirs, assigns, etc., will always be ready to execute and register the same at the expenses of the vendee."

It will be seen that this clearly purports to transfer the vendor's interest in immoveable property. In *Gnanamuthu Nadan* v. *Veilukanda Nadathi*[7] Odgers and Hughes, JJ., held that a partition list containing a list of the properties which fell to each sharer on a partition did not require registration even though signed by all the co-sharers and attested when it contained no words which could be construed as creating a partition of status. In this case *Gopayya* v. *Kristnayya*[5] was followed. This decision strongly supports the contention of Mr. Varadachari on behalf of the respondents that the document is not one required to be registered. In Referred Case No. 5 of 1883, *A reference under S. 49 of the Stamp Act*[8] it was held by a Full Bench of this Court that a document signed by the members of a Hindu family and attested by witnesses, which purported to be an account or list of the share of one member of the family in the family property and in which it was recited that the parents of the family were to enjoy certain lands and that the outstanding debts should be divided at a future date was not liable to stamp duty as a partition deed. In *Ramaswami Aiyar* v. *Thirupathi Naik*,[9] a case relied upon by the learned Advocate-General on behalf of the appellants, it was stated that the criterion for purposes of registration is what is expressed on the face of the documents, not what incidents

5. (1922) 16 LW. 784.
6. (1929) L.R. 56 I.A. 363: 57 M.L.J. 756 (P.C.).
7. (1923) 19 L.W. 494.
8. (1884) I.L.R. 7 M. 385 (F.B.).
9. (1903) I.L.R. 27 M. 43: 13 M.L.J. 356.

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may be annexed by custom to a grant of the kind. This case was relied upon by the appellants because it was there held that the document must be taken to be an agreement to lease, and in consequence subject to the provisions of the Registration Act as if it were a lease.

On a consideration of these cases I have come to the conclusion, although not without some hesitation, that this document cannot be said to be merely the minutes of a previous oral agreement to divide. The fact that it is of the same date as the alleged oral agreement to divide is of importance, but it does not necessarily follow that the proper conclusion to be drawn from that is that it is an agreement to partition and I am not basing my conclusion merely upon that fact because it seems to me that the document being signed and the other document (not produced) which is its counter-part also being signed indicates that it was intended that this document and the other should be the evidence of the partition. It must be borne in mind that no partition deed is effected without some previous discussion of its terms and it is not rendered any the less a partition deed on that account and although this case is not very dissimilar to *Gnanamuthu Nadan* v. *Veilukanda Nadathi*,[7] for the reasons already given, Exhibit VIII, in my view, required to be registered and not having been so it is not admissible in evidence for the purpose required. But even though inadmissible in evidence to prove a partition, I am of the view that it could be used in evidence not for what it contains but as evidence of a division in status. As Jackson, J., stated in *Veerappan* v. *Mylai Udayan*[2] it would be evidence of intention to divide, and as Spencer, J., stated in *Saraswatamma* v. *Paddayya*[4], being unregistered it could be used to prove a division in status. In *Ramu Chetty* v. *Panchammal*[10] it was held by Kumaraswami Sastri and Venkatasubba Rao, JJ., that a division of status can be proved even if the deed of partition is inadmissible in evidence for want of registration and that an unregistered document may be used to determine the nature of the possession held by a party and that where a deed of partition is inadmissible in evidence for want of registration the terms of the partition cannot be proved except by the document itself but if it is unnecessary to decide the terms of partition, it is open to a Court to infer from the conduct and dealings of the parties that there was a division in status. On page 1029 Kumaraswami Sastri, J., states as follows:—

2. (1924) 87 I.C. 285.
4. (1922) I.L.R. 46 M. 349: 44 M.L.J. 45.
7. (1923) 19 L.W. 494.
10. (1925) 92 I.C. 1028.

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"So far as the division of status is concerned, a recent decision of the Privy Council in *Rajangam Aiyar* v. *Rajangam Aiyar*[11] is clear to the effect that a division of status can be proved even though the document has not been registered. It has also been held by their Lordships of the Privy Council that an unregistered document may be used to determine the nature of the possession held by a party. The Subordinate Judge has not relied upon any unregistered partition deed. For the purpose of coming to the conclusion he has arrived at, he takes the conduct of the parties into consideration and comes to the conclusion that not only has the division of status been proved but all the properties claimed have been enjoyed by the defendant's husband in his own right. I do not see why the evidence as regards the conduct of the parties in their dealings with each other and with regard to specific items of property should not, coupled with the finding of a division of status, be used and relied upon to show that certain properties which the plaintiff claims are not in wrongful possession of the defendant but belonged to the defendant's husband. I do not think that on the facts of the case, S. 92 of the Evidence Act is necessary to be invoked by any of the parties. The plaintiff comes into Court and says that he is the absolute owner of the property, because he is a member of an undivided family."

I may pause here and say that that is what the plaintiffs in this suit base their claim upon.

"The defendant says that her husband was not a member of an undivided family, that he was divided in status, and that he enjoyed certain properties separately, as a divided member of the family."

that is what the 1st and 2nd defendants say in this suit.

"This is not a case when a claim is made by the defendant to any property on the allegation that it came to her by virtue of a deed of partition which is unregistered and so inoperative. The plaintiff's claim as a member of the joint family could not be sustained."

Although the correctness of Kumaraswami Sastri, J.'s opinion in stating the effect of the decision in *Rajangam Aiyar* v. *Rajangam Aiyar*[11] has been questioned, his judgment in other respects is a very strong one in support of the respondent's contention here. Another case relied upon by the respondents is *Chhotalal Aditram* v. *Bai Mahakore*[12]. There it was held that the fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved for want of registration. In the course of the judgment paragraph 405 of Taylor on Evidence (10th Edition) was quoted. It is as follows:—

"The fact of the existence of a particular relationship may be shown by parol evidence, though the terms which govern such relationship appear to be in writing . . . . . The fact of partnership may be proved by parol evidence of the acts of the parties without producing the deed."

In *Ahobilachariar* v. *Tulasi Ammal*[13] Ramesam, J., took the same view. In *Subramania Aiyar* v. *Savitri Ammal*[14] Sankaran Nair, J., held that a partition deed not registered is

11. (1922) L.R. 50 I.A. 134: I.L.R. 46 M. 373: 44 M.L.J. 745 (P.C.).
12. (1917) I.L.R. 41 B. 466.
13. A.I.R. 1927 M. 830.
14. (1908) 19 M.L.J. 228.

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admissible in evidence to prove the status of the members but is inadmissible in evidence to prove the transaction so far as it affects immoveable properties and Pinhey, J., held that such a partition deed cannot affect any immoveable property comprised therein nor be received in evidence of any transaction affecting such property but is admissible to prove the fact of a partition having been effected. In *Sikhamani Pandithar* v. *Ammani Ammal*[15] Spencer and Phillips, JJ., held that a document which effects a partition by itself where there has been no prior partition is not admissible in evidence to prove a unilateral declaration or division in status but if such declaration has taken place prior to the document it can be received as evidence of that division in status. There is no doubt now that an unequivocal declaration by a member of an undivided family of his intention to be divided in status is sufficient to effect a partition and in *Girja Bai* v. *Sadashiv Dhundiraj*[16] it was held that a letter by a member of a Hindu family indicating his intention to separate himself and enjoy his share in severalty coupled with a suit for partition was as unequivocal and clearly expressed an intention as could be made and that it amounted to a separation with all its legal consequences. The case referred to by Kumaraswami Sastri, J., in *Ramu Chetty* v. *Panchammal*[10] is *Rajangam Aiyar* v. *Rajangam Aiyar*,[11] and his opinion as to the effect of this judgment has been doubted as before stated and, in my view, it does no more than decide that the document in that case not being a document by itself creating, assigning, limiting or extinguishing any right or interest in immoveable property and not therefore requiring registration was admissible in evidence so far as it went. It did not decide that a document which did require to be registered could yet be used in evidence to prove a division in status although cases since that time, namely, *Gnanamuthu Nadan* v. *Veilukanda Nadathi*,[7] *Ramu Chetty* v. *Panchammal*[10] and *Mahalakshmamma* v. *Suryanarayana*,[17] have clearly laid down that a document required to be registered as effecting a partition can be used as evidence of a division in status. The latter case is reported in *Mahalakshmamma* v. *Suryanarayana*.[17] On page 990 Reilly, J., states:

"The effect of the ruling of the Privy Council in *Varada Pillai* v. *Jeevarathnammal*[18] is that, 'while such a document cannot be used to prove

7. (1923) 19 L.W. 494.
10. (1925) 92 I.C. 1028.
11. (1922) L.R. 50 I.A. 134: I.L.R. 46 M. 373: 44 M.L.J. 745 (P.C.).
15. (1917) 40 I.C. 36.
16. (1916) L.R. 43 I.A. 151: I.L.R. 43 C. 1031: 31 M.L.J. 455 (P.C.).
17. (1928) I.L.R. 51 M. 977: 55 M.L.J. 733.
18. (1918) L.R. 46 I.A. 285: I.L.R. 43 M. 244: 38 M.L.J. 313 (P.C.).

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such a transaction, it can be used to prove a different fact relating to the property even though that fact is intimately connected with the transaction,"

and on page 991 dealing with the unregistered document he states:

"But the opinion has been expressed—and I venture to think rightly—that it can be used to prove a division in status, which we can dissociate from, and which does not necessarily imply, a division of property."

In *Varada Pillai* v. *Jeevarathnammal*[18] there was a document reciting a gift and it was not registered and it was held that the gift was invalid and that the recitals in the document could not be used as evidence of a gift but might be referred to as explaining the nature and character of the possession thenceforth held by the person to whom the gift had been made. On page 251 Viscount Cave in delivering the judgment of their Lordships of the Privy Council states:—

"It should be added that, although the petitions of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani."

A consideration of these cases leads me to the conclusion that Exhibit VIII was admissible in evidence to prove a division in status but could not be used as evidence of how the property was divided; and furthermore in my opinion it was not necessary even to refer to Exhibit VIII at all for purposes of proving a division in status as such division could be proved by evidence as to the conduct of Sambayya and Ramayya. When that conduct is considered it seems to me clear that there was a division in status between them.

[His Lordship then dealt with the evidence.]

I see no reason for thinking that the will, Exhibit VII, is not genuine or for believing that Ramayya did not know what it contained. That being so, he acquiesced in the position taken up by Sambayya, namely, that of a divided brother. This, coupled with his own statement in Exhibit I, is sufficient evidence that he and Sambayya were at least divided in status. This disposes of the appellants' contention that they are entitled to the whole of Sambayya's property by right of survivorship. It is quite true that Exhibit VIII cannot be referred to in order to say what properties fell to the share of Sambayya and I do not think that the will can be referred to for that purpose either. The fact remains that he had a power of disposition over his half share in each of the joint family properties. It is quite

18. (1918) L.R. 46 I.A. 285: I.L.R. 43 M. 244: 38 M.L.J. 313 (P.C.).

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clear from the evidence already referred to that Sambayya took Koti Reddi in adoption. But the respondents' case is that the appellants are not entitled to any share in Ramayy's property because the 2nd defendant was his *illatom* son-in-law and by survivorship he is entitled to the whole of that property. It lies upon the defendants to prove this relationship and it must be proved very clearly and must not be left a matter of speculation at all. I have had the advantage of reading the judgment of my learned brother Curgenven, J., and entirely agree with the conclusions he has arrived at with regard to the alleged *illatom* relationship between the 2nd defendant and Ramayya both on the facts and upon the law, and I also agree with him in his opinion as to the effects of an *illatom* relationship if proved on the shares in the property. With regard to the rice mill, I am satisfied that it was the self-acquired property of Sambayya and as this question has been fully dealt with in the judgment of my learned brother I do not think it is necessary for me to add anything further upon this point.

The appeal is allowed in part. In modification of the decree of the lower court we declare that the late Pamireddi Sambayya and Ramayya died divided in status from each other, that the plaintiffs 2 to 7 and the 1st and 3rd defendants are entitled to the right and enjoyment of the 1st plaintiff's half share of items 1 to 51 of the plaint A schedule and to be placed in joint possession of the same along with defendants 1 and 2 as co-owners in respect of the said items and that items 52 and 53 of the said A schedule were the self-acquired properties of the late Sambayya to which the plaintiffs have no right; and we further order that except as to the declaration before granted in respect of items 1 to 51 of plaint A schedule, the decree of the lower court is confirmed and that each party do bear his own costs throughout.

Curgenven, J.

Curgenven, J.—The main facts of this case have been summarised in the judgment which My Lord has just delivered. The question of fact first arising is whether the partition deed, Exhibit VIII, and the will, Exhibit VII, purporting to have been executed by Sambayya, are genuine. As to this there can, I think, be no two opinions, so that it is unnecessary to go at great length into the evidence.

[His Lordship delat with the evidence and continued.]

It has next to be considered whether Exhibit VIII is admissible in evidence to prove the partition. The document opens thus:—

"Particulars of the immoveable properties which fell to the share of Pamireddi Sambayya in the division of the family properties, effected on 9th November, 1924, between the sons of Pamireddi Lakshmanna (1) Sambayya, and (2) Pamireddi Ramanna's adopted son Ramayya, residents of Dokiparru village."

Then follows a list of the items of property comprising Sambayya's share. The circumstances in which this document and the corresponding document setting out Ramayya's share, which is not now forthcoming, were executed are narrated by the writer of them, D.W. 3. Sambayya gave him rough drafts and he wrote the fair copies from them in the presence of the two brothers, Sambayya himself dictating the particulars from the drafts. The deeds were then signed and attested. We have to consider whether in the terms of S. 17 of the Registration Act, Exhibit VIII "purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in immoveable property," and the first test to apply is whether the document formed an essential part of the process of dividing the property or whether there is ground to suppose that the partition had already taken place, perhaps by oral arrangement, and was complete when the document was executed. It appears to me that the circumstances narrated by the writer show that this was not a case of an oral partition completed and done with, and lists separately and subsequently drawn up. I think that if ever a partition deed can be regarded as an integral part of the partition, Exhibit VIII was such a deed. The importance attached to it is shown by the previous preparation of a rough draft and by the employment of a draftsman, and its formal and binding character is apparent from its being signed by both the brothers and attested by witnesses. So far then as intention can be gathered from the course taken, it was not merely to prepare a list or memorandum but to execute a legally valid deed. In point of fact it affords virtually the only evidence relied upon in proof of the partition in this case, although it so happens that other incidental evidence of the fact of partition is forthcoming.

It is then necessary to see whether Exhibit VIII can be said to purport or operate to affect immoveable property within the meaning of S. 17. We have had a variety of other cases relating to partition documents brought to our attention but no very useful purpose will be served by discussing them in detail as each document must be dealt with according to its terms. An instance of a somewhat extreme view is afforded by *Jiwan Ali Beg* v. *Basa Mal*[19], which dealt not with a parti-

19. (1886) I.L.R. 9 All. 108.

tion document but with a receipt for money paid under a mortgage bond. The contention was that the document *pro tanto* extinguished the mortgage debt and accordingly should be registered. I only refer to the case because Edge, C.J., who delivered the leading judgment, expressed the view that the strictest construction must be placed upon the provisions of the Registration Act and it must be clear that the document objected to comes within the four corners of those provisions. An alternative view is that the Court should ensure that the provisions of the Act are not evaded by any mere informality in the language, so long as the document was intended to operate and does operate in the manner laid down in S. 17. In *Reference under S. 49 of the Stamp Act*[8] a Full Bench had to consider on a reference under S. 49 of the Stamp Act whether the referred document was a partition deed, but in that case I think the terms of the document, which were bare of any operative words, led without difficulty to the conclusion that it was "a note that a certain property had on partition been allotted for the maintenance of parents and a memorandum of the particulars of property which had on partition fallen to the share of one of the brothers." So too the document in *Gnanamuthu Nadan* v. *Veilukanda Nadathi*[7] was a mere list of property headed with the name of the sharer to whom it fell, and although it was signed and attested, it was held to be admissible in evidence. Of a different character was the partition deed in *Pothi Naicken* v. *Naganna Naicker*[1], which contained the recital "As we have in the presence of the undermentioned panchayatdars divided. . . ." and which was held actually to effect a division and so to be inadmissible for want of registration. No doubt the legal character and effect of Exhibit VIII would be clearer if it contained some such formal declaration as "we hereby divide," but mere informality of language should not, in my view, be allowed to defeat the provisions of the Registration Act. The document says "Particulars of the immoveable property which fell to the share of Pamireddi Sambayya in the division of the family properties effected on 9th November, 1924." If it had said "we hereby declare that the following are the particulars of immoveable property, etc.," no doubt could be entertained as to its nature; and since it is, in substance and intention a declaration to that effect, it must, I think, be deemed to operate within the meaning of S. 17. Indeed, had it been a registered document and tendered in proof of

1. (1915) 30 M.L.J. 62 (F.B.). 7. (1923) 19 L.W. 494.
8. (1884) I.L.R. 7 Mad. 385 (F.B.).

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Sambayya's title to his share in the property, I have no doubt that any Court would accept it as such. In these circumstances I am clearly of opinion that under S. 49 of the Registration Act it must be excluded in so far as it is evidence of a transaction affecting immoveable property.

Assuming then that the deed is inadmissible to show what disposition of the family property was made at the division, the point next arising is whether it is admissible to prove a division of status. Mr. Varadachari has endeavoured to show, I think successfully, that upon this question judicial opinion, as revealed by the decisions of this Court, has gradually but unmistakably settled to the view that a partition deed, otherwise inadmissible, may be received in evidence of a division of status. As an instance of the earlier view that such a document is in all respects inadmissible may be cited the judgment of Oldfield, J., in *Pothi Naicken* v. *Naganna Naicker*[20]. The learned Judge held that a division in status alone necessarily converted the joint tenancy of a co-parcener into a tenancy-in-common, and this change extinguished one kind of right in the property and created another within the meaning of S. 17 of the Registration Act. The other member of the Bench, Sankaran Nair, J., took the different view that a document merely creating a separation in status did not fall within the provisions of the Registration Act because the consequential change in the tenure of the property was by operation of rules of Hindu law and not by virtue of the instrument. In the Letters Patent Appeal from these judgments reported as *Pothi Naicken* v. *Naganna Naicker*[1] the view was taken that the document must be treated as a whole, and as a whole was inadmissible, notwithstanding that it dealt with moveables as well as immoveables. *Ayyakutti Mankondan* v. *Periaswami Koundan*[3] is another Letters Patent Appeal from differing judgments of two learned Judges, Spencer and Sadasiva Aiyar, JJ. Spencer, J., thought that the document did not require registration at all, so that the further question did not arise; Sadasiva Aiyar, J., took the opposite view and considered further that the division of status created by it could not logically or properly be separated from the extinction of joint rights in immoveable property effected by the same document, which is the same view as Oldfield, J., took in *Pothi Naicken* v. *Naganna Naicker*[20]. We find this opinion adopted again by Spencer and Phillips, JJ., in *Sikhamani Pandithar* v. *Ammani*

1. (1915) 30 M.L.J. 62 (F.B.). 3. (1913) 30 M.L.J. 404.
20. (1915) 28 M.L.J. 423.

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Ammal[21]. Two judgments of their Lordships of the Privy Council appear to have contributed more than anything else to an alteration of opinion. One is the well-known case of *Girja Bai* v. *Sadashiv Dhundiraj*[16] which held that an unequivocal expression of intention on the part of a co-parcener was sufficient to effect a division of status. The other was *Rajangam Aiyar* v. *Rajangam Aiyar*[11] which dealt with the admissibility of a document drawn up in certain partition proceeding. Admittedly the document in the latter case effected a division of status, and although their Lordships did not refer to or discuss any of the Madras decisions upon this point, the only conclusion compatible with their judgment is that a document declaring a division of status does not require registration on the ground that such a division must necessarily affect the family property within the meaning of S. 49 of the Registration Act. In *Saraswatamma* v. *Paddayya*[4] a partition deed which was inadmissible to prove particulars of partition was accepted to prove an intention to be divided in status, the learned Judges relying much on *Girja Bai* v. *Sadashiv Dhundiraj*[16] in coming to this conclusion. *Ramu Chetty* v. *Panchammal*[22] is another decision to the same effect; and the principle was accepted by Kumaraswami Sastri and Reilly, JJ., in *Mahalakshmamma* v. *Suryanarayana*[17]. I think accordingly that, following the current of recent judicial opinion, there is no question but that we may look into Exhibit VIII to decide whether the brothers were joint or several in status. Even if the current course were to exclude the document altogether, there is ample authority for the view that evidence of division may be received from other sources. Direct authority for this proposition is furnished by *Chhotalal Aditram* v. *Bai Mahakore*[12] where it is explained that S. 91 of the Evidence Act does not preclude proof by parol evidence of a fact which is not a term of the document; and the fact of division is not such a term any more than would be, for instance, the fact of relationship of mortgagor and mortgagee or of landlord and tenant. A case of this Court dealing with same matter is *Ramu Chetty* v. *Panchammal*[22]. The evidence in order not to offend against S. 91 of the Evidence Act must be restricted to the

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4. (1922) I.L.R. 46 M. 349: 44 M.L.J. 45.
11. (1922) L.R. 50 I.A. 134: I.L.R. 46 M. 373: 44 M.L.J. 745 (P.C.).
12. (1917) I.L.R. 41 B. 466.
16. (1916) L.R. 43 I.A. 151: I.L.R. 43 C. 1031: 31 M.L.J. 455 (P.C.).
17. (1928) I.L.R. 51 M. 977: 55 M.L.J 733.
21. (1917) 440 I.C. 36.
22. (1926) M.W.N. 45.

fact that a partition has taken place and must not extend to the particulars of the division, as, for instance, the items which fell to Sambayya's share. That apart from the recital in Exhibit VIII there is ample evidence of the fact of a partition cannot be disputed. It is unnecessary I think to go further than the will Exhibit VII itself, attested as it is by Ramayya. Therein it is stated that Sambayya and his younger brother remained joint for a very long time and recently became divided. Exhibit I, Ramayya's petition to the Deputy Collector, contains an express admission to the same effect. The finding that Exhibit VIII is inadmissible to show what property fell to each brother's share must result in the conclusion that each enjoyed an undivided share in each item of property, a conclusion which must necessarily involve an alteration in the decree which has been passed in this suit.

The next question is whether the 2nd defendant has succeeded in proving his relationship as *illatom* son-in-law to Ramayya. He is a son of a sister, Machamma, of Ramayya and Sambayya and evidence is adduced to show that he was brought into the house in which the brothers were jointly residing when he was 14 or 15 years old, and married to Sambayya's daughter, Suramma. This girl, it is said, was brought up by Ramayya who gave her away in marriage to the 2nd defendant. In this way, it is explained, his *illatom* relationship to Ramayya originated. The proof which is offered of it consists, firstly, in some oral evidence as to what took place at the marriage, and what then and subsequently the brothers said; and, secondly, in Ramayya's admissions contained in the applications, already referred to, for the village munsif's post. In weighing this evidence, it will be well to bear in mind with what difficulties the 2nd defendant is confronted. An *illatom* relationship to a father-in-law may or may not be rare in the community to which the parties belong but there can be no question that such a relationship to a father-in-law's brother is quite unusual, so that it is unlikely on *a priori* grounds that such an expedient would be resorted to; nor is it easy to see with what motive or intention an undivided brother would adopt such a course. It is said that he brought up Suramma as he was living with her father in a state of jointness. It is difficult to see what this means, and what practical difference it would make in Suramma's position in the family. If it was desired to bring the 2nd defendant into the house, the obvious course would have been for Sambayya himself, who had no son, to take him as *illatom*. [After discussing the documentary

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evidence in the case, His Lordship observed that there "was no scrap of paper" to prove alleged relationship of the second defendant as the *illatom* son-in-law of Ramayya.]

As has been observed by a Bench of this Court, *Panda Pattayya* v. *Panda Venkamma*,[23] claims of this nature should be very carefully scrutinised, as an ordinary son-in-law may be tempted to get possession of his father-in-law's property by such means. In the present case, the 2nd defendant's claim is to an estate of about half a lakh in value and he seeks to displace persons whose title is otherwise unimpeachable. Allowing all due weight to the admissions made by Ramayya, it cannot be gainsaid that they occur at a very late stage, and that there is no record to show that on any previous occasion the *illatom* relationship was asserted. On the contrary, such documents as bear upon the matter rather run counter to the theory. Thus the oral evidence has a very heavy burden thrown upon it. It is unnecessary, I think, to hold that the witnesses are consciously misrepresenting the truth in order to arrive at the conclusion that it would be unsafe to act upon their statements. They are reporting observations made in conversation for the most part a good many years ago, and there is probable source of confusion arising from the identification of Ramayya with his undivided brother's concerns. He might quite naturally have said—as indeed he appears to have said to the Deputy Tahsildar in Exhibit II—"We have taken Krishna Reddi as *illatom* son-in-law." It may even be that, of his brother's daughters, he bestowed his affection and care specially upon Suramma—no other meaning has been suggested to the statements that he "brought her up"—and if so he would naturally take a particular interest in her husband, and may have gone so far as to say that he was going to make him his heir. However that may be, the oral evidence does not in my view establish the status, and differing from the trial Court, which appears to regard as proved an unqualified agreement by Ramayya to make the 2nd defendant his heir, I am unable to accept the fact of *illatom*.

Even if the *illatom* relationship had been established, I do not think that the learned advocate for the respondents has succeeded in demonstrating that a father-in-law who takes a son-in-law in *illatom* thereby deprives himself of the right to devise his property, much less to alienate any portion of it while still alive. It is not disputed that in the Reddi community to which the parties belong the custom is to be found of taking a son-

23. (1915) 17 M.L.T. 393.

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in-law into the family, especially where there is no son. This may be done, it seems, without the execution of any document or the performance of any ceremony, though it cannot be inferred that every son-in-law, who becomes an inmate of his wife's family house thereby acquires the status of *illatom* son-in-law. The practice is a departure from ordinary Hindu law, and accordingly it lies upon the party claiming by virtue of the status to override the provisions of that law to substantiate his claim. This cannot in general be done, as for instance can be done in a case of adoption, by appeal to settled rules of law, because the practice of *illatom,* being of rare occurrence and confined to certain castes, has never become crystallised into fixed rules of law by a long course of judicial decisions. Thus we frequently find that, when some legal consequence of the relationship has had to be decided, the Court has found it necessary to base its finding upon evidence specially recorded for the purpose. Upon the question now before us, no such evidence is available, and Mr. Varadachari has had to depend upon the available case-law as the only means whereby to demonstrate his proposition.

Unfortunately little if any direct authority for it or against it has been found. There are cases where the question arose as to the right of an *illatom* son-in-law, compared with that of a natural-born son, as, for instance, *Hanumantamma* v. *Rami Reddi*[24], where the procedure I have already alluded to, that of taking evidence *ad hoc,* was resorted to, and the trial Court returned a finding that the *illatom* takes the same share as would be taken by an adopted son, while the High Court held that upon the evidence he should take an equal share with a natural-born son, a difference of view which shows how doubtful may be the incidents of this custom. In the same case, the power of an *illatom* to demand partition was a question raised but not decided; and this same question was in *Chinna Obayya* v. *Sura Reddi*[25] held to depend upon custom and to be determinable only upon evidence. The case was remanded for evidence to be taken, but what the result was has not been discovered. In *Chenchamma* v. *Subbayya*[26] the status of an *illatom* arose for consideration, and it was held that he was not a co-parcener with an after-born son, nor a joint tenant, but a tenant-in-common. It has not been seriously contended that a co-parcenery exists between the *illatom* and his father-in-law, and there is authority, as, for instance, in *Emi Sooramma* v.

24. (1881) I.L.R. 4 M. 272. 25. (1897) I.L.R. 21 M. 226.
26. (1885) I.L.R. 9 M. 114.

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Yarabati Varahalu[27] that on the father-in-law's death he gets no right of survivorship. It is not possible, I think, to deduce from these decisions, even were they capable, which they are not, of universal application, that the *illatom* has, during the father-in-law's life-time, such an interest in the latter's property as would give him a right to interdict alienation and devise. Mr. Varadachari admits that the interest enjoyed is of a peculiar kind, which he would define as vested but variable. It would certainly be a very strong thing to hold that a father-in-law debars himself from disposing of any property thenceforward, and, indeed, the learned advocate only goes to the length of suggesting that alienation for the purpose of defeating the *illatom* rights would be invalid as against it. It would be more reasonable to impose a limit upon the father-in-law's power of devise, although whether this should be total or partial would need to be decided by reference to evidence of usage. On the whole, later cases appear to me not to be in conflict with the earliest cited to us, *Challa Papi Reddi* v. *Challa Koti Reddi*[28]. The finding in that case was that the defendant's father obtained his rights in pursuance of a special custom which entitled his father-in-law to select a son-in-law who should take his proparty as if a son. Holloway, J. (with whom Innes, J., agreed) held that the son-in-law did not become a joint tenant, and the father-in-law had no such restrictions imposed upon his powers of alienation as the existence of a son would entail. He goes on: "The power of complete disposition, as against both a widow and daughters, has, rightly or wrongly, been upheld, and there would be great difficulty in saying that the son-in-law, so affiliated, could be in a better position. . . . There is nothing illogical in saying that the person so affiliated shall inherit all of which the affiliator died possessed, but that he does not and cannot stand in the same position as one who became a joint tenant at the instant of birth."

So far as I can see, it is only by reference to a special agreement that this conclusion can be successfully resisted. In the present case, even if the evidence is relied upon to the full, I do not think that more could be derived from it than that Ramayya agreed to take the 2nd defendant as *illatom*, subject to what were known or understood to be the incidents of that status. As was held by the Judicial Committee in *Narain Das* v. *Ramanuj Dayal*[29] a promise to make a person one's heir may while giving rise to an expectation fall short of a contract.

27. (1926) 101 I.C. 828.
28. (1872) 7 M.H.C.R. 25.
29. (1897) L.R. 25 I.A. 46: I.L.R. 20 A. 209 (P.C.).

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Near the conclusion of the arguments, Mr. Raghava Rao for the appellants drew our attention to an unreported case of this Court, A.S. No. 206 of 1912, where the very question which now engages us arose. The learned Judges found the evidence available for the decision of the point so unsatisfactory that they called for a finding upon fresh evidence; and the District Judge, after examining numerous witnesses on each side, returned a finding that the father-in-law was not precluded from disposing of his property either *inter vivos* or by will, which was accepted by the Bench. The case came from the Kurnool District, and while it may not be permissible to import the conclusion, as partly a conclusion of fact, into this case, yet the procedure adopted is only one further illustration of the correct method of settling a disputed question of usage. It lay heavily upon the 2nd defendant, in my view, to show that by specific customary law overriding the general Hindu Law he had a preferential right to the rights of Ramayya's alienees, and in this respect too I think that his case fails.

A question that remains is whether the mill and godown, items 52 and 53, were owned jointly by the brothers or were the separate property of Sambayya.

[His Lordship then discussed the evidence.]

It is impossible to suppose that Ramayya would have signified his assent to this arrangement if the mill had in fact been joint property and accordingly, in spite of one or two earlier indications to the contrary, I agree with the learned Subordinate Judge in regarding this last piece of evidence as conclusive of Sambayya's separate ownership.

These are all the questions that have been argued in this appeal, and, agreeing with My Lord as to the answers which should be given to them, I agree also as to the practical consequences which should follow, and the orders which should be passed.

S.R. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Srimath Deivasikamani Annamalai Desikar, Pandara Sannadhi of Tiruvannamalai Adhinam at Kunnakudy, Ramnad District (dead) and another .. *Appellants** (*Petnr. and his L.R.*)

v.

Raju Pillai *alias* Margasagayam Pillai and others .. *Respondents* (*Defts. and L.R. of the 1st Deft.*).

Srimath Deivasikamani Annamalai Desikar *v.* Raju Pillai.

Limitation Act (*IX of* 1908), *Arts.* 181 *and* 182—*Decree—Possession to be taken on payment of compensation for improvements effected—When executable—Application for extension of time—Whether step-in-aid—Civil Procedure Code, S.* 48—*Whether applicable.*

A decree directed that the plaintiff was to take possession of certain lands on payment of an amount to be ascertained as compensation for improvements effected by the defendants. The plaintiff put in his execution petition on 15th December, 1919. After the amount was ascertained in 1920, the payment not being made by the plaintiff, the execution was adjourned from time to time. In 1921 the plaintiff put in a petition for extension of time and was granted. But even then he did not pay and the execution petition was dismissed on the 16th of August, 1921. On the 6th of August, 1924, the plaintiff put in an execution petition for delivery of property on his paying the amount for compensation. Objection was taken that it was time-barred since more than three years had elapsed after the previous application for execution was put in.

Held, (*i*) that the application by the plaintiff asking for extension of time to make the payment was not a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act,

(*ii*) that, having regard to the way in which the decree was drawn, the fixing of the amounts by the learned District Judge was the final settling of the decree, and from that date the plaintiff was at liberty to make his payment and his right to apply within the meaning of Art. 181 accrued on that date, and

(*iii*) that section 48 of the Code only provides for the dismissal of execution petitions which come in after the period of 12 years. It has no application to execution petitions put in at an earlier date and does not purport to deal with them.

Appeal against the order of the District Court of North Arcot, dated 25th October, 1926 and made in E.P. No. 26 of 1924 in O.S. No. 10 of 1914.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for appellants.

T. R. Ramachandra Aiyar, S. Srinivasa Aiyar and *V. C. Veeraraghavan* for respondents.

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*A.A.O. No. 141 of 1927. 22nd July, 1930.

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The Court delivered the following

JUDGMENTS. *Reilly, J.*—In this case a decree was made that the plaintiff should recover certain property from the defendants and that he should pay to certain of the defendants amounts for improvements. Grammatically those might be two separate provisions in the decree; but I think there is no doubt that the intention of the decree was that on the payment of those amounts the plaintiff should be entitled to recover possession. The learned District Judge adopted a rather curious course in making his decree in respect of those amounts to be paid for improvements. He fixed them provisionally. He provided in the decree that they were subject to revision on the report of a commissioner to be appointed by the Court. There was an appeal against the decree; but it was dismissed by this Court in December, 1918. On the 15th of December, 1919, the plaintiff put in an execution petition, in which he prayed for the appointment of a commissioner to fix the amounts to be paid for improvements and for possession of the property. Eventually the commissioner made his report, and the District Judge after considering it adopted the amounts suggested by the commissioner on the 12th of November, 1920 and ordered that the plaintiff should pay those amounts into Court by the 17th of December, 1920. The amounts were not paid by that date, and the execution petition was adjourned from time to time; and eventually on the 8th of August, 1921, the plaintiff put in an application that further time might be granted to him for payment, and time was granted to him up to the 16th of August, 1921. On that date the money had not been paid and the execution petition was dismissed. Then on the 6th of August, 1924, the plaintiff put in E.P. No. 26 of 1924 for delivery of the property on payment of the amounts fixed. Objection was taken by some of the defendants that that petition was time-barred, because it was put in more than three years after the previous execution petition. The plaintiff contended that the bar of limitation was saved by his application of the 8th of August, 1921, for the adjournment of the previous execution petition in order to allow him time to make the payments. The learned District Judge decided against that contention and dismissed the second execution petition. The present appeal is against that order of dismissal.

Mr. Rajah Aiyar, who appears for the plaintiff, has first contended that the application for extended time for payment, which was made on the 8th of August, 1921, was a step-in-aid

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of execution within the meaning of Art. 182 of the Limitation Act. He has first referred us to *Sankara Nainar* v. *Thangamma*[1] in which it was held that an application made by a mortgagor for extension of the time allowed him for payment in a decree for redemption was a step-in-aid of execution. With very great respect I am not able to understand that decision. The application of the mortgagor in that case appears to me to have been an application to extend the time fixed in the original decree, that is an application to vary the original decree. There are provisions for making such applications in respect of redemption decrees. I do not myself understand how such an application could be treated as coming within the words "step-in-aid of execution" in Art. 182 of the Limitation Act. But that, as I have said, was a decision in a mortgage suit and so perhaps may be regarded as not exactly applicable to the present case. What appears to be of more use to the plaintiff in this case is the decision in *Abdul Kader Rowther* v. *Krishnan Malaval Nair*,[2] in which an application for time to get an encumbrance certificate for the purpose of a sale in execution was regarded as a step-in-aid of execution. Mr. Justice Ayling in *Masilamani Mudaliar* v. *Sethuswami Aiyar*[3] expressed dissent from that view; and it has to be noticed that there is a decision directly in conflict with it in *Ramaswami* v. *Veeranna*.[4] But Mr. Rajah Aiyar has brought to our notice two cases of the Bombay High Court, *Haridas Nanabhai* v. *Vithaldas Kisandas*[5] and *Seshadasacharya* v. *Bhimacharya*,[6] in which applications for time for getting copies of decrees or other documents were held to be steps-in-aid of execution, and has also quoted *Pitam Singh* v. *Tota Singh*,[7] *Bhairon Prasad* v. *Amina Begam*,[8] and *Raghunath Prasad Singh* v. *Lachmi Narain Singh*,[9] which are to the same effect. But, even if to ask for time to get from other persons documents necessary for execution proceedings can properly be regarded as a step-in-aid of execution, in my opinion to defer, or to ask time for, doing something which concerns the decree-holder himself cannot properly be regarded as aiding execution. It is rather in my opinion postponing execution. To say that it is aiding execution to ask for extended time for payment, because the decree-holder, if he gets time,

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1. (1921) I.L.R. 45 M. 202: 41 M.L.J. 374.
2. (1913) I.L.R. 38 M. 695: 26 M.L.J. 433.
3. (1916) I.L.R. 41 M. 251: 33 M.L.J. 219.
4. (1927) 53 M.L.J. 766.
5. (1912) I.L.R. 36 B. 638.
6. (1912) I.L.R. 37 B. 317.
7. (1907) I.L.R. 29 A. 301.
8. (1916) I.L.R. 38 A. 690.
9. (1925) I.L.R. 47 A. 667.

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may be able to earn or borrow or otherwise raise money, appears to me unreasonable; and no decision has been brought to our notice in which an application for time for that purpose has been held to be a step-in-aid of execution. The payment of the money may well be a step-in-aid of execution; but the means and the opportunity of the decree-holder for raising it appear to me to be entirely unconnected with execution. In my opinion, therefore, the application of the plaintiff for further time to make the payment was not a step-in-aid of execution.

But Mr. Rajah Aiyar has contended alternatively that Art. 182 of the Act has no relation to this case, because in the decree no time was fixed for the payment of the amounts for improvements and they could not have been paid on the date of the decree as they had not then been determined. That appears to me to be a good argument, and, if it is so, then we must turn to Art. 181. If we do that, we find that the period of limitation is three years from the date when the right to apply accrues. Mr. Rajah Aiyar indeed goes further and has contended that, as no time was fixed for payment in the decree, the plaintiff might have paid at any time up to the end of the twelve years, and in support of that he has quoted *Rukmina Kuar* v. *Sheo Dat Rai*[10] and *Chhedi* v. *Lalu*.[11] Neither of those cases appears to me to support that contention as each turned upon the interpretation of the particular words of the decree concerned. In the first case the decree-holder was at liberty to pay the amount at any time in a certain month in any year. In the second case, which was one of pre-emption, time was held to run from the date of the payment of the pre-emption amount within the period allowed in the decree. Neither of those cases, I think, can help the plaintiff. The appropriate article appears to me to be Art. 181, and we have only to determine the date when the right to apply accrued. In this case the accrual could not be a continuing thing; the right must have accrued on some particular date. Now, as I have said, the District Judge left the amounts to be paid for improvements unsettled in the decree, and under the decree they were to be fixed later on the report of a commissioner. A commissioner was appointed, and on his report the District Judge fixed the amounts on the 12th of November, 1920. In my opinion the effect of that was that those amounts were fixed upon that day and then became part

10. (1919) 17 A.L.J. 841. 11. (1902) I.L.R. 24 A. 300.

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of the decree. If there was anything irregular in the learned District Judge's procedure in arriving at his decree in that way, the plaintiff or any one else concerned had his right to appeal; but that is not a question to be decided in execution. The amounts were fixed on the 12th November, 1920, and the order then made was that they should be paid by the 17th of December, 1920. But, as I have mentioned, they were not paid, and that execution petition was eventually dismissed on the 16th of August, 1921. Mr. Rajah Aiyar contends that, even if we are to take the amounts as brought into the decree when the District Judge eventually fixed them in November, 1920, yet, because the execution petition was not disposed of until the 16th of August, 1921, his right to apply within the meaning of Art. 181 did not arise until the dismissal of the petition on the 16th of August, 1921. That appears to me an untenable contention. The suggestion is that the fixing of the amounts on the 12th of November, 1920, was merely an interlocutory matter, which did not really take effect until the execution petition was finally disposed of in August, 1921. But, if we look upon the fixing of the amounts as an interlocutory matter incidental to the execution petition, when that petition was dismissed, the order fixing the amounts went with it. I do not think that is the proper way to regard the matter. If we remember the way in which this decree was drawn, the fixing of the amounts by the learned District Judge on the 12th of November, 1920, appears to me to have been the final settling of the decree, and from that date the plaintiff was at liberty to make his payment and his right to apply within the meaning of Art. 181 accrued.

Mr. Rajah Aiyar has raised one more contention, viz., that even apart from the facts that no date for payment was fixed in the decree and payment could not be made on the date of the decree, Art. 181 of the Limitation Act does not apply to this case, but only S. 48 of the Code of Civil Procedure, which gives the decree-holder 12 years from the date of his decree for his application. That contention depends upon the wording of Art. 181. The wording is "applications for which no period of limitation is provided elsewhere in this schedule or by S. 48 of the Code of Civil Procedure, 1908." Mr. Rajah Aiyar suggests that S. 48 of the Code of Civil Procedure does provide a period of limitation, 12 years for all decrees other than decrees for injunction, and that, if we exclude from Art. 181 all applications which are provided for in other articles of the Limitation Act and also decrees (other than decrees for injunction) which are provided for in S. 48 of the Code, there is very little

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left for Art. 181 and certainly not enough to cover this case. That is a curious result of what at first sight might be taken to be the grammatical meaning of Art. 181. If we look at Art. 182, we find that the wording on the face of it may present almost the same difficulty. It runs:

"For the execution of a decree or order not provided for by Art. 183 or by S. 48 of the Code of Civil Procedure, 1908."

Literally, according to Mr. Rajah Aiyar's interpretation, that would mean that Art. 182 first excludes decrees included within Art. 183 and then excludes every decree which comes within S. 48 of the Code of Civil Procedure. Then to what decrees other than decrees for injunction would Art. 182 apply? I think those conundrums arise only from a superficial view of the wording of Arts. 181 and 182. Those articles like the rest of Schedule I of the Limitation Act must be read with S. 3 of the Act. S. 3 of the Act provides that suits, appeals and applications made after the periods of limitation prescribed in the first schedule shall be dismissed, that is, these periods of limitation set out in the different articles of Schedule I of the Act are only to be taken in reference to the question of dismissal. Then we come to Art. 182. If we read it, as I think we ought to, "for the execution of a decree or order not provided for as regards dismissal by Art. 183 or by S. 48 of the Code of Civil Procedure," there is no difficulty about it, because S. 48 of the Code only provides for the dismissal of execution petitions which come in after the period of 12 years. It has no application to execution petitions put in at an earlier date and does not purport to deal with them. And in the same way, if we read Art. 181, as "application for which no period of limitation for the purpose of dismissal is provided elsewhere in this schedule or by S. 48 of the Code of Civil Procedure," there is no difficulty about it, and in fact the universally recognised interpretation of those articles is the right one, not the curious interpretation which Mr. Rajah Aiyar suggests from his view of the grammatical language of the articles, which is perhaps not very happy.

Mr. Rajah Aiyar's last contention, therefore, that neither Art. 181 nor Art. 182 applies to this case, but only S. 48 of the Code of Civil Procedure, in my opinion also fails.

In my opinion this appeal must be dismissed with costs.

Anantakrishna Aiyar, J.—I agree.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Kavanna Vana Ena Swaminathan *alias* Chidambaram Pillai .. *Appellant** (*1st Deft.*)

v.

Letchmanan Chettiar and others .. *Respondents* (*Plff. and 2nd Deft.*).

Registration Act (*XVI of* 1908), *Ss.* 73 *and* 77—*Order of refusal to register passed by Sub-Registrar—Application to Registrar under S.* 73 (1) —*Dismissal—Suit filed in Civil Court under S.* 77—*Thirty days period—Computation—Date of order or its communication to party—Petition dismissed by Registrar as being time-barred—Order whether one of refusal.*

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The plaintiff presented a sale-deed for registration before the Sub-Registrar on the 28th September, 1926. That officer declined to register the document on the 18th October as the executant failed to appear before him to admit registration. The Sub-Registrar's order was despatched to the plaintiff and he received it on the 19th October. Thereupon he made an application under S. 73 (1) of the Registration Act to the District Registrar to establish his rights to have the document registered. The District Registrar held that the application was out of time and rejected it on the 16th December. This order was communicated to the plaintiff on the 20th December, 1926. Thereupon he filed a suit under S. 77 of the Act on the 19th January, 1927. It was contended by the defendants that the suit having been instituted more than thirty days from the date of the order of the District Registrar was barred by limitation.

Held, that, under the circumstances of the case, time should be calculated only from the date when the order was communicated to the party, and consequently both the application to the Registrar under S. 73 (1) and the suit under S. 77 were not time-barred.

Distinction between cases where the order of refusal is passed in the presence of the party and cases where it is made in his absence and without notice pointed out.

Abdul Ali v. *Mirja Khan,* (1903) I.L.R. 28 Bom. 8, followed.

Held, further, that an order dismissing a petition on the ground that it is time-barred is as much an "order of refusal" within the meaning of S. 77 (1) as an order dismissing the petition on the ground that it has no merits.

Appeal against the order, dated 2nd August, 1928, of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 7 of 1928, preferred against the decree of the Court of the District Munsif of Sivaganga in Original Suit No. 45 of 1927.

The Advocate-General (*A. Krishnaswami Aiyar*) and *V. Ramaswami Aiyar* for appellant.

T. R. Ramachandra Aiyar and *S. R. Dikshit* for respondents.

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*C.M.A. No. 269 of 1928. 26th November, 1929.

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Venkatasubba Rao, J.

The Court delivered the following

JUDGMENTS. *Venkatasubba Rao, J.*—The question we have to decide is, what is the meaning of the expression "making of the order" in Ss. 73 and 77 of the Indian Registration Act? The plaintiff on 28th September, 1926, presented, to the Sub-Registrar for registration, Ex. A, the sale deed executed in his favour by the 1st defendant. The latter, in spite of notices served upon him, failed to appear before the officer in question, and, on the 16th of October the plaintiff filed a statement requesting the Sub-Registrar to make an order refusing registration. After making an order to that effect on the 18th of October, the Sub-Registrar sent a post-card, Ex. B, to the plaintiff informing him of the order and it reached him on the 19th of October. The plaintiff on the 18th of November applied to the Registrar under S. 73 to establish his right to have the document registered. That section enacts that the application should be made within thirty days after the making of the order of refusal by the Sub-Registrar. If the *terminus a quo* is the date when the order was communicated to the plaintiff, the application is in time; but if the thirty days should be computed from the date of the order, the application is a day too late.

The District Registrar rejected the application on the ground that it was barred by time. He made his order on the 16th of December and forwarded it to the plaintiff on the 20th and it reached him on the 23rd. The plaintiff filed the suit from which the present appeal arises on the 19th of January, 1927. S. 77 enacts that the party desiring to impeach the order of the Registrar should file a suit within thirty days after the making of an order of refusal. If the starting point is the date of the District Registrar's order, the suit is out of time by four days; if it is the date when the order reached the plaintiff, the suit is well within time. The District Munsif dismissed the suit, holding that it is time-barred. The lower appellate Court took the opposite view and remanded the suit for further trial.

I shall now notice briefly the various sections that have a bearing on the point to be considered. S. 35 provides that if any person by whom the document purports to be executed denies its execution, the Sub-Registrar shall refuse to register the document. It is conceded that failure of the executant to appear amounts to a denial of execution by him. See *Sivarama Pattar Kariakar* v. *Krishna Aiyar*[1] and *Chhotey Lal* v. *Collector of Moradabad.*[2]

1. (1914) 26 M.L.J. 307.

2. (1922) L.R. 49 I.A. 375: I.L.R. 44 A. 514 at 517 (P.C.).

S. 71 says that when the Sub-Registrar so refuses, he shall make an order of refusal and record his reasons for such order in his Book No. 2 and endorse the words "Registration refused" on the document.

S. 73 (1) enacts that when a Sub-Registrar has refused to register a document on the ground that the alleged executant denies its execution, the person against whom the order is made, may, within thirty days after the making of the order of refusal, apply to the Registrar in order to establish his right to have the document registered.

S. 76 says that every Registrar refusing to direct the registration of a document shall make an order of refusal.

Lastly, S. 77 enacts that any person claiming under such a document may, within thirty days after the making of the order of refusal, institute a suit for a decree directing the document to be registered.

I have now referred to the relevant sections of the Act and shall proceed to consider the points raised. Apart from authority, it seems to me that there can be no valid order unless it is made after notice to the parties affected by it; or it is communicated to them in the absence of such notice. To take a contrary view seems opposed to reason and principle. The learned Advocate-General for the defence contends that we must have regard to the express wording of the Act and that the words "making of the order" are too distinct to admit of any liberal construction. The answer is that no two constructions are possible, the meaning I have suggested being the only reasonable construction of the words. The very word "order" by necessary implication means, in law, that the party affected has had reasonable notice of it. Not a single case in India has been brought to our notice which takes a different view. On the contrary, every decision on the point seems to recognise the principle I have stated. That any particular ruling proceeds on the special provisions of any Act makes, in my opinion, no difference. *Abdul Ali* v. *Mirja Khan*[3] is a case under S. 77 of the Indian Registration Act and is directly in point. The same rule has been laid down without equivocation in *Annamalai* v. *Cloete*,[4] *Seshamma* v. *Sankara*,[5] *The Secretary of State for India* v. *Gopisetti Narayanaswami Naidu*[6] and *Mahipat* v. *Lakshman*.[7] The essence of the rule is that the decision should

3. (1903) I.L.R. 28 B. 8.
4. (1883) I.L.R. 6 M. 189.
5. (1888) I.L.R. 12 M. 1.
6. (1910) I.L.R. 34 M. 151.
7. (1900) I.L.R. 24 B. 426.

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be passed in such circumstances that the parties should have reasonable notice of it. If when a petition is presented or a case is heard, the order is then and there made in the presence of the parties, no further question arises; if the making of the order is postponed, the parties should be given notice of the adjourned date, so that they may be present and hear the decision when passed. If, in these two cases, the party owing to his own fault, does not become aware of the order, it nevertheless takes effect at once. If an order is made without previous notice, it does not become operative until it is communicated. These, in my opinion, are rules which are in conformity with justice and common sense.

In the present case, the allegation in the plaint has not been challenged, that the Sub-Registrar neither fixed a date for pronouncing his order, nor gave notice of any day having been fixed. The same remark applies to the order made by the District Registrar.

The learned Advocate-General for the defence relies upon certain English cases; but, if properly examined, they support my view rather than establish the contrary. The first case relied on is *The King* v. *The Justices of Staffordshire.*[8] Lord Ellenborough in that case no doubt says:

> "It is, however, a case of great grievance and hardship where the interests of parties are thus invaded by an order made behind their backs; and may be a good ground to apply to Parliament for a revision of the clause of appeal; but we cannot remedy the abuse."

These observations are apt to mislead if regard be not had to the facts of the case. Under the statute, any resident of the locality aggrieved by the order had a right of appeal. The party that preferred the appeal was a member of the public and was not a person directly concerned with the proceeding. It was such a party that urged that he had no notice of the order. In refuting his contention, Le Blanc, J., points out that, if the right of appeal were to depend, in the case of a public highway in which all the King's subjects are interested, on *personal* notice of the order in respect of each subject, there never would be an end of the time for appealing. This case, therefore, does not support the view urged for the defence.

The next case relied on by the learned Advocate-General is *The Queen* v. *The Justices of Derbyshire.*[9] This does not help him, as there is nothing in it to show that the surveyor referred

8. (1802) 3 East 151: 102 E.R. 554.
9. (1845) 7 Q.B. 193: 115 E.R. 461.

to in the judgment did not have an opportunity of knowing the order, when it was made.

The Queen v. *Barnet Sanitary Authority*[10] is a very instructive case on the point. Under the Act, a rate as well as an order may form a subject of appeal. In the former case, the time counts from the date when the party has notice of the rate; in the latter, from the date when the order itself is made. Why is this distinction made? Blackburn, J., points out, that a person may be rated behind his back, but *prima facie*, an order is not so made. Mellor, J., even more pointedly observes:

"The local authority had, under the Act, an opportunity to show cause and unless they chose not to appear, the order could not have been made in their absence."

I may lastly refer to *Ex parte Johnson*,[11] which recognises the anomaly involved in the position, that a party is bound by an order which he had no reasonable opportunity of knowing. It is, therefore, clear that the view contended for by the learned Advocate-General is opposed to the English and the Indian cases alike.

A feeble attempt has next been made to show that the order of the District Registrar rejecting the application as time-barred is not an order of refusal under S. 77. This contention is clearly opposed to section 76, which makes no distinction between one kind of refusal and another. Whatever be the ground of his decision, the order is one of refusal. What significance can possibly attach to the fact that the ground of refusal was that the application was barred? No case has held that rejection of an application on the ground that it is barred is not an order of refusal. Before a party can come to a Civil Court, he is bound as a condition precedent, to apply to the Registrar within a stated time. If the Registrar *rightly* holds that the application made to him is barred, it is obvious that the condition precedent has not been fulfilled. The civil suit in such a case is clearly incompetent. This, and no more, is the effect of the cases to which we have been referred, namely, *Kunhimmu* v. *Viyyathamma*,[12] *Edun* v. *Mahomed Siddik*,[13] *Gangadhara* v. *Sambasiva*[14] and *Udit Upadhia* v. *Imam Bandi Bibi*.[15]

In the result, the appeal fails and is dismissed with the costs of the first respondent.

10. (1876) L.R. 1 Q.B.D. 558. 11. (1863) 32 L.J.M.C. 193: 122 E.R. 354.
12. (1884) I.L.R. 7 M. 535 at 537.
13. (1882) I.L.R. 9 C. 150 at 154.
14. (1916) I.L.R. 40 M. 759 at 764: 33 M.L.J. 51.
15. (1902) I.L.R. 24 A. 402 at 413 (F.B.).

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Madhavan Nair, J.:—This Civil Miscellaneous Appeal arises out of a suit instituted by the plaintiff under section 77 of the Indian Registration Act for getting a decree directing the sale deed, dated 4th January, 1926, executed to him by the 1st defendant, to be registered in the Sub-Registrar's office at Sivaganga.

The facts are briefly these: The plaintiff presented the sale deed for registration before the Sub-Registrar of Sivaganga on the 28th September, 1926. That officer declined to register the document on the 18th October, 1926, as the executant failed to appear before him to admit registration. It is conceded that his failure to appear amounts to "denial of execution" under S. 35 of the Registration Act; see *Radhakissen Rowra Dakna* v. *Chooneeloll Dutt*,[16] *Sivarama Pattar Kariakar* v. *Krishna Aiyar*,[1] *Ezekiel* v. *Annada*[17] and *Chhotey Lal* v. *Collector of Moradabad*.[2] The Sub-Registrar's order was despatched to the plaintiff and he received it on the 19th October, 1926. Thereupon he made an application under S. 73 (1) of the Indian Registration Act to the District Registrar at Ramnad to establish his rights to have the document registered. Applications to the Registrar under this section should be made "within 30 days after the making of the order of refusal" by the Sub-Registrar. The plaintiff's application was presented on 18th November, 1926, *i.e.*, after 30 days from the date of the order of refusal by the Sub-Registrar on 18th October, 1926, but within 30 days after the order was communicated to him. The District Registrar held that the application was out of time and rejected it on 16th December, 1926. This order was communicated to the plaintiff on 20th December, 1926. Thereupon the plaintiff instituted this suit under S. 77 of the Registration Act. A suit under this section should be instituted "within 30 days after the making of the order of refusal" by the District Registrar. The plaint in the present suit was filed on 19th January, 1927, *i.e.*, after 30 days from the date of the order of the District Registrar but within 30 days after it was communicated to him.

It was contended by the defendants (1) that the suit having been presented more than 30 days from the date of the order of the District Registrar rejecting the application, was barred by limitation, and (2) that the plaintiff has no right to institute the suit under S. 77 of the Registration Act, as it was not brought on any "order of refusal" by the Registrar, as the

1. (1914) 26 M.L.J. 307.
2. (1922) L.R. 49 I.A. 375: I.L.R. 44 A. 514 (P.C.).
16. (1879) I.L.R. 5 C. 445.
17. (1922) 36 C.L.J. 109,

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application to the Registrar was thrown out as time-barred. The District Munsif upheld these contentions and dismissed the suit without going into the merits.. On appeal the learned Subordinate Judge overruled them and remanded the suit to the Lower Court for disposal. This appeal is by the defendants against the order of remand and the above contentions urged by them before the Lower Courts are again pressed before us with great force by the learned Advocate-General.

The provisions of sections 73 (1) and 77 (1) of the Indian Registration Act are as follows:—

Section 73 (1).—"When a Sub-Registrar has refused to register a document on the ground that any person by whom it purports to be executed, or his representative or assign, denies its execution, any person claiming under such document, or his representative, assign or agent authorised as aforesaid, may, within 30 days after the making of the order of refusal, apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered."

Section 77 (1).—"Where the Registrar refuses to order the document to be registered, under S. 72 or S. 76, any person claiming under such document, or his representative, assign or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree."

The first question for consideration is whether the suit is time-barred under S. 77 of the Registration Act. As already observed, a suit under this section will be within time, if it is instituted "within thirty days after the making of 'the order of refusal' by the District Registrar." It is argued, on one side, that the expression "making the order of refusal" in S. 77 of the Registration Act means only recording the order of refusal in writing, and that the time should be calculated from the date of the "order of refusal," in which case the plaintiff's suit will be out of time; while, on the other side, it is contended that the expression means not merely the recording of the order in writing by the Registrar but communicating it to the party concerned, and that, in this case, time should be calculated from the date when the order was communicated to the plaintiff, in which case, his suit will be in time. The answer to the question must depend on the special circumstances of each case. If the order of refusal is pronounced in the presence of the parties immediately after inquiry by the Registrar, so that the person concerned knows that his request has been refused, then there can be no doubt that time should be calculated from the date of the order; but if the order was not so pronounced, and the

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person concerned does not know that his request has been refused, then it would not be just to hold that time should be calculated from the date of the order. How is an aggrieved party to take any action unless he *knows* that an adverse order has been passed by the Registrar? If the construction contended for by the appellant is accepted, then it is clear that in cases of this kind the party aggrieved may be altogether deprived of the privilege of taking proceedings under S. 73 (1) and S. 77 of the Act. It is not contended that the Sub-Registrar and the Registrar pronounced their orders in the presence of the parties after the inquiry was over, or that those officers fixed any day for pronouncing their orders, or gave notice fixing any date for pronouncing them. In these circumstances, it seems to me that, in this case, time should be calculated only from the date when the order was communicated to the parties. An order to be valid under S. 77 of the Act should be passed in the presence of the parties; or after notice to them; if no notice has been given, then it should be communicated to them; in other words, the order to be a valid one must be brought to the knowledge of the party against whom it has been passed. It is conceded that there is no provision in the Act for communicating the orders of the Registrar and Sub-Registrar to the parties concerned. It seems to me, therefore, that the intention of the Act is that the officers should pronounce their orders in the presence of the parties after the inquiry is over, or should do so, after giving the parties notice.

This very question arose for decision in the Bombay High Court in *Abdul Ali* v. *Mirja Khan*[3] and it was held in that case by Chandavarkar and Ashton, JJ., that the expression "making an order" in S. 77 of the Indian Registration Act (III of 1877) means not merely the recording of the order of refusal in writing but communicating it to the party concerned so as to bind him by it. The Punjab Chief Court also decided the question in the same way following *Abdul Ali* v. *Mirja Khan*[3]; see *Kirpa Ram* v. *Asa Singh*.[18] In our own Court, this particular point has not been considered in any case under the Registration Act, but attention may be drawn to cases under the Madras Survey and Boundaries Acts (XXVIII of 1860 and IV of 1897), which contain an analogous provision limiting the period allowed for the institution of suits in which it has been held that time does not begin to run until the date on which the decision sought to be set aside is communicated to the parties. (See *Annamalai*

3. (1903) I.L.R. 28 B. 8.

18. (1917) 41 I.C. 76.

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v. *Cloete,*[4] *Seshamma* v. *Sankara*[5] and *Secretary of State for India* v. *Gopisetti Narayanaswami Naidu.*[6] See also *Mahipat* v. *Lakshman,*[7] a decision under the Khoti Act.) The correct principle is pointedly stated in *Secretary of State for India* v. *Gopisetti Narayanaswami Naidu*[6]:

"A decision cannot properly be said to be passed until it is in some way pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing what it contains. Till then, though it may be written out, signed and dated, it is nothing but the decision which the officer intends to pass. It is not passed so long as it is open to him to tear up what he has written and write something else."

In support of his contention that the time for the suit should be computed from the date of the order, the learned Advocate-General mainly relied on three English cases, *The King* v. *The Justices of Staffordshire,*[8] *The Queen* v. *The Justices of Derbyshire*[9] and *The Queen* v. *Barnet Sanitary Authority.*[10] These cases appear at first sight to support his contention, but, when read in the light of their circumstances, these will not be found to be inconsistent with the view which I have expressed above.

In *The King* v. *The Justices of Staffordshire*[8] an order was made under 13 Geo. III, c. 78 for turning part of a highway. By section 29 of that statute, an appeal is given to "the party grieved by any such order or proceeding at the next Quarter Sessions after such order made or proceeding had, etc." It was held that the appeal must be made to the Quarter Sessions next after the order made, without reference to any notice received by such appellant. The reason why the learned Judges arrived at this conclusion appears in the following observations of Le Blanc, J.:—

"In the case of a public highway, all the King's subjects may be said to be interested, and to have a right to appeal against an order for stopping it up: and therefore if the right of appeal were to depend on personal notice of the order to the appellant, there never would be an end of the time for appealing."

In commenting on this case in *The Queen* v. *The Justices of Derbyshire,*[9] which will be referred to presently, the learned Judges refer to these remarks of Le Blanc, J. From this we may infer that the literal construction, contended for, was put upon the words of the statute, as there would be no end of appealing, if such a construction was not adopted. Having regard to these

4. (1883) I.L.R. 6 M. 189.
5. (1888) I.L.R. 12 M. 1.
6. (1910) I.L.R. 34 M. 151.
7. (1900) I.L.R. 24 B. 426.
8. (1802) 3 East 151: 102 E.R. 554.
9. (1845) 7 Q.B. 193: 115 E.R. 461.
10. (1876) L.R. 1 Q.B.D. 558.

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observations, which give the reason for this decision, I do not think the case can be understood as laying down any general rule of interpretation.

In *The Queen* v. *The Justices of Derbyshire*[9] an order was made, under 4 and 5 Vic., c. 59, requiring a surveyor of highways to pay money out of the highway rates in aid of turnpike funds. By S. 3 of that statute a right of appeal is given to the person aggrieved "within six days after such order shall be made or given." It was held that the time for appeal runs from the making of the order, not from the service. It may be gathered, from the following remarks of Lord Denman, C.J., appearing in the judgment that, in cases under the statute, the parties interested would have opportunities to know about the order at the time when it is made. The learned Judge says:

"We may add that the Act provides some means for giving notoriety to the proceeding at the Petty Sessions, and even notice to the parties directly interested in opposing such an order."

It would appear (*see* Maxwell's Interpretation of Statutes, 7th Ed., page 7) that the order appealed against in this case must have been verbally pronounced by the Justices. If so, we may presume that it was pronounced either in their presence or after notice to them.

In *The Queen* v. *Barnet Sanitary Authority*[10] it is clear from the report of the arguments that the order was made in the presence of the person affected by it. It also appears from the judgments of Blackburn, J. and Mellor, J., that the persons affected by the "order" or "conviction" in such cases always have opportunity of being present at the time when the orders affecting them are made. Blackburn, J., observes thus:

"Where the appeal is against a rate, the 'cause of appeal' would *prima facie* be upon notice of the rate, but where the appeal is from any order or conviction, one would certainly, *prima facie,* say that as soon as the order is made the party has a right to appeal, and is not bound to wait until the order is served."

The point is more explicitly stated by Mellor, J., who observes thus:

"Here the local authority had, under the Act, an opportunity to show cause, and unless, they chose not to appear, the order could not have been made in their absence. . . . The cause of appeal begins from the time the order is pronounced. The order is not required to be in writing, it may be a verbal and informal decision, and the party convicted either does know or ought to know the grounds on which the Justices have proceeded."

In this view, this case also does not support the appellant's contention. Attention may also be drawn to the decision in

9. (1845) 7 Q.B. 193: 115 E.R. 461.
10. (1876) L.R. 1 Q.B.D. 558 at 561.

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Ex parte Johnson,[11] where it was held that under 7 and 8 Vic. c. 101, section 4, which enacts that "within 24 hours after the adjudication and making of any order" in bastardy, the putative father may give notice of appeal to the Quarter Sessions, that the time must be counted from the oral adjudication of the Justices in Petty Sessions and not from the time when the formal order is signed by them. On the whole, I do not think that these English cases compel us to hold that the time for instituting the suit under S. 77 of the Registration Act must always be calculated from the date of the order of the refusal made by the Registrar, irrespective of the question whether the party concerned had notice of the order or not.

It follows from what I have said that, since the plaint in this case was filed within 30 days after the order of refusal by the Registrar was communicated to him, this suit under S. 77 of the Registration Act is not time-barred. For the same reasons, I must hold that the application to the Registrar under S. 73 (1) of the Act was also made in time and that the rejection of it by the Registrar as time-barred was wrong.

The next argument of the appellant is that the suit is not maintainable, as the Registrar rejected the plaintiff's petition on the ground that it is time-barred without going into the merits. It is argued that such orders are not "orders of refusal" as contemplated by the section. I do not think that this contention is well founded. No authority has been cited in support of it. An order dismissing a petition on the ground that it is time-barred is as much an "order of refusal" within the meaning of the section as an order dismissing the petition on the ground that it has no merits. The Act does not make any distinction between those two kinds of orders. One of the conditions that should be complied with by a person instituting a suit under S. 77 of the Registration Act is that he must show that he applied to the Registrar within the time allowed by law. If the Registrar rightly rejects the petition on the ground that it is time-barred, then it means, that the plaintiff did not comply with this condition precedent to the maintenance of the suit under the section; and a suit under S. 77 of the Act will not therefore lie. This was all that was decided by the Allahabad High Court in *Udit Upadhia* v. *Imam Bandi Bibi*,[15] where it was held that the Registrar's order in that case rejecting the application as filed beyond time could not be considered as a "refusal

11. (1863) 32 L.J.M.C. 193: 122 E.R. 354.
15. (1902) I.L.R. 24 A. 402 (F.B.).

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to register" within the meaning of the Act. The other decisions referred to by the appellant, *Kunhimmu* v. *Viyyathamma*,[12] *Edun* v. *Mahomed Siddik*[13] and *Gangadhara* v. *Sambasiva*,[14] do not advance his case any further. In this case, I have shown that the Registrar's order rejecting the application made by the plaintiff as time-barred is wrong, *i.e.*, that the application was made in time; in other words, that the plaintiff has complied with the condition precedent to the maintenance of the suit. It, therefore, follows that the plaintiff's suit is maintainable.

The Civil Miscellaneous Appeal fails and must be dismissed with costs of the first respondent.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

N. Namberumal Chetti .. *Appellant* in both (Plff.)*

v.

Veeraperumal Pillai and others .. *Respondents in both (Defendants).*

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Indian Succession Act (XXXIX of 1925), Ss. 57, 213 and 307—Will dealing with immoveable property in Madras—Probate not taken—Pecuniary legacy—Claim to—Maintainability—Executor—Estoppel of—Alienation for personal debts—Rights of alienee—Past immoral consideration—Validity of—Ademption and satisfaction—General doctrine of—Applicability.

In the case of wills executed outside Madras, probate need be taken of them only in so far as they relate to immoveable properties within Madras. A suit for a pecuniary legacy, unconnected with any such property that may be dealt with by the will, is maintainable without probate.

An executor who has entered upon his duties as such is estopped from pleading immunity from his obligation as executor, on the ground no probate has been taken out by him.

Munisami Chetti v. *Maruthammal*, (1910) I.L.R. 34 Mad. 211: 20 M.L.J. 687 referred to.

Under section 307 of the Succession Act, an executor has, no doubt, the power to dispose of the property for all purposes binding upon the estate and even where the executor deals with the property for purposes not strictly binding on the estate, the alienations cannot be questioned so as to defeat the *bona fide* alienee who had no notice of the fact that the executor was using his powers for purposes not binding upon the estate. But where the alienation is made for purposes not binding on the estate and the alienee has notice of the fact, the principle does not apply.

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*O.S. Appeals Nos. 66 and 125 of 1928. 28th February, 1930.

12. (1884) I.L.R. 7 M. 535 at 537.
13. (1882) I.L.R. 9 C. 150 at 154.
14. (1916) I.L.R. 40 M. 759 at 766: 33 M.L.J. 51.

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Williams on Executors, p. 697, referred to.

Bank of Bombay v. *Suleman Somji*, (1908) L.R. 35 I.A. 139: I.L.R. 33 Bom. 1: 18 M.L.J. 435 (P.C.), followed.

Per *Ramesam, J.*—Past immoral consideration is good consideration.

Lakshminarayana Reddiar v. *Subhadri Ammal*, (1902) 13 M.L.J. 7, approved.

Husseinali v. *Dinbai*, (1923) 25 Bom. L.R. 252; *Kisondas* v. *Dhondu*, (1919) I.L.R. 44 B. 542; *Ganapati Chetti* v. *Sundararaja Pillai*, (1929) M.W.N. 828, dissented from.

Obiter.—The general principles underlying Ss. 177 and 179 of the Succession Act regarding ademption and satisfaction are applicable even to wills not governed by the Act.

On appeal from the decrees of the Honourable Mr. Justice Beasley (now Chief Justice), dated 7th August, 1928 and 25th September, 1928 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 300 of 1927.

S. Varadachariar, V. Masilamani Pillai, C. Krishnamachariar and *T. S. Venkatesa Aiyar* for appellant.

V. Radhakrishnayya for respondents.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—These appeals arise out of a suit, C.S. No. 300 of 1927, filed by one Namberumal Chettiar against four defendants. The 1st defendant is Veeraperumal Pillai, nephew and executor of the estate of P. Appasami Pillai, who died on the 4th of October, 1921. The 2nd defendant is Kanthammal, the illegitimate daughter of Appasami Pillai. The 3rd defendant is the Official Assignee in whom the property of the 1st defendant is now vested on account of insolvency. The 4th defendant is Mr. S. G. Satagopa Mudaliar, an Advocate of this Court, who was in 1923 the Receiver of another estate which was the subject of a litigation and who in the capacity of such Receiver advanced a loan of 2½ lakhs to the 1st defendant-executor on a deed of mortgage, dated the 10th of April, 1923; and he is impleaded in this suit as such mortgagee. Ramesam, J

The suit was for the administration of the estate of the deceased Appasami Pillai and for the recovery of the balance of legacy of Rs. 15,000 with further interest and of a sum of Rs. 15,000 due on a promissory note with further interest. The suit came on for trial before Beasley, J., as he then was, and he dismissed the suit for the legacy but gave a decree for the balance of the money due on the promissory note after crediting the admitted payments towards that note, the decree being executable against the assets, if any, of the deceased Appasami

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Pillai now in the hands of the 1st defendant personally. The plaintiff files these two appeals separately, one in respect of the legacy and the other in respect of the promissory note.

The further facts necessary for understanding the points arising in these appeals are as follows:—

Appasami Pillai was for nearly thirty years before his death keeping one Aparanji Ammal and she was living with him in his house as his wife. He had by her a daughter Kanthammal, 2nd defendant, already mentioned. On the 11th of August, 1915, he executed a will, Ex. A-5, under which he devised two of his properties (items 9 and 10) to his elder brother's son-in-law, Srinivasa Pillai, and all the rest of his properties to his elder brother's son, Veeraperumal Pillai, 1st defendant in the suit, whom he named as executor to the will. About a year before his death, that is on the 19th of October, 1920, he addressed to his nephew (1st defendant) a letter Ex. A-6 containing testamentary dispositions. This letter shows that it was written at his residence known as "Winning Post" near the Guindy Race Course, Guindy, outside the Original Side Jurisdiction of Madras. In this letter he says:

"If I should depart this life you will pay to my beloved second wife M. Aparanji Ammal the sum of Rs. 15,000 and you will take the whole of my property both moveable and immoveable I am possessed of."

Three days afterwards, that is, on the 22nd of October, he and the executor, that is, the 1st defendant, executed a promissory note, Ex. A-1, for Rs. 15,000 in favour of the said Aparanji Ammal with interest at 4 per cent. per annum. He died, as I have already mentioned, in October, 1921. In December, 1921, the executor applied for a probate of the will, Ex. A-5 and of the letter, Ex. A-6. This application was numbered as T.O.S. No. 1 of 1922, the affidavit of assets filed with it, dated the 1st of December, 1921, being Ex. A-4. A brother of the 1st defendant, named Sethurama Pillai, filed a caveat; but probate was ordered. There was an appeal by Sethurama Pillai (O.S.A. No. 67 of 1922). The matter was compromised. The 1st defendant promised to pay Rs. 50,000 to Sethurama Pillai and the latter withdrew his appeal. Soon after the withdrawal, the 1st defendant applied for a loan of 2½ lakhs to the 4th defendant. Ex. A-3 is the deed of mortgage for the amount. It recites that the purpose of the mortgage was to pay off the following sums of money:—(1) a sum of Rs. 29,015 due to Shah Agarchand Manmal on two mortgage deeds of 1921 executed by the testator and renewed by the 1st defendant after his death, (2) a sum of Rs. 41,600 due to

the Secretary of the Sri Madhava Mohanji Temple on a mortgage executed by the testator, (3) a sum of Rs. 15,000 directed to be paid to Aparanji Ammal under the will, (4) the cost of taking out probate, etc., estimated at Rs. 15,000, (5) a sum of Rs. 38,773-14-6 due from the 1st defendant to Messrs. Gillanders Arbuthnot & Co. in connection with his timber trade and (6) a sum of Rs. 1,05,000 due to Kannailal on a deed of mortgage, dated the 2nd of March, 1922, executed by the 1st defendant for himself and on behalf of his minor son. The total of these items come to about Rs. 2,44,000. It will be seen from the above description that two of the items amounting to about Rs. 1,43,000 representing the private and personal debts of the mortgagors, the 1st defendant and his son, and the small balance of Rs. 6,000 was also utilised by them personally. The other four items amounting to Rs. 1,00,615 represent debts for purposes binding on the estate. It will be observed that the 1st defendant in executing the above mortgage apparently thought that the will, Ex. A-5, and the letter, Ex. A-6, both refer to the same sum of Rs. 15,000 and that he has only to pay a sum of Rs. 15,000 to Aparanji Ammal. It is true that he does not say so in so many words. But as he does not provide for the payment of Rs. 30,000 to Aparanji Ammal, that must have been his understanding of the transactions. The probate was never taken. Some years afterwards the 1st defendant became an insolvent. Immediately after the mortgage, Rs. 2,000 was paid to Aparanji Ammal. Five months afterwards another Rs. 1,000 was paid. In September, 1924, a sum of Rs. 1,000 was paid. In September, 1924, a sum of Rs. 600 and in June, 1925, another Rs. 400 was paid to Kanthammal, daughter of Aparanji Ammal, who must have died some time before September, 1924. Kanthammal, who succeeded to Aparanji Ammal's right to the legacy and in the promissory note as her daughter assigned her right to the present plaintiff, Namberumal Chetti. He filed the suit on the 30th of May, 1927. The learned Trial Judge held that, as no probate was actually taken of Exhibits A-5 and A-6, the plaintiff's claim to the legacy fails, that the consideration for the promissory note was 30 years' past cohabitation of Aparanji Ammal with the testator, it was not illegal and bad consideration as it was for past immoral services. He, therefore, gave judgment for the balance due on the promissory note.

One of the questions argued in appeal is whether Ex. A-6 should be called a will or codicil and whether the plaintiff's claim cannot be established unless a probate is taken out for

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it. As will be seen, the first part of this question is really immaterial. It matters little whether you call Ex. A-6 an independent will or codicil. Seeing that, between Exs. A-5 and A-6, items 9 and 10 originally mentioned in Ex. A-5 have ceased to be the testator's property, there could be no legacy of these items to Srinivasa Pillai; and as the disposition of the rest of the property to the 1st defendant was repeated in Ex. A-6, it seems to me that Ex. A-6 is a complete and independent will by itself. The only need to refer to Ex. A-5 is to find out the executor of the deceased's estate. Ex. A-6 may, therefore, be regarded as a complete will and not supplemental to some other will which it adds to or modified. But it is unnecessary to pursue this question any further. As to which or any of these two documents requires a probate, the law is contained in sections 57 and 213 of the Indian Succession Act (XXXIX of 1925) as amended by Act XXXVII of 1926. The provisions of Part VI, that is from section 57 to section 191, apply (1) to all Hindu wills executed in Bengal and within the local limits of the Ordinary Original Civil Jurisdiction of the High Courts of Judicature at Madras and Bombay, and (2) to all wills and codicils made outside these territories and limits so far as relates to immoveable property situate within those territories or limits. When we remember that section 57 is a re-enactment of the Hindu Wills Act of 1870, section 57 (1) shows that, in the case of wills executed outside Madras, probate must be taken of them only in so far as they relate to immoveable properties situated within Madras. Ex. A-6 was written at Guindy, that is outside Madras; and, though part of it relates to immoveable property situated within Madras, so far as the legacy of Rs. 15,000 given to Aparanji Ammal is concerned, that disposition does not relate to immoveable property within Madras. To that extent Part VI of the Succession Act does not apply to the will and therefore no probate has to be taken. Clause (2) of section 57 shows that, even in respect of such Hindu wills, the provisions of section 63 apply showing that in the case of wills executed outside Madras, some provisions of Part VI do not apply. If the contention of Mr. Radhakrishnayya for the respondents that probate must be taken for the whole of Ex. A-6 is correct, sub-clause (*b*) would have been worded "to all wills and codicils made outside those territories containing any disposition of immoveable property situated within those limits". The words "so far as" are limiting words, cutting down what is indefinite to definite limits.

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I am of opinion that in so far as the plaintiff has got to establish a right to the legacy of Rs. 15,000 no probate need be taken of Ex. A-6 whether we regard it as a separate or independent will or whether it be regarded as a codicil supplementary to the will, Ex. A-5. In either case, to the extent that the plaintiff's right to the legacy is sought to be established no probate need be taken of it. From the point of view of the executor, what is now sought is not to establish any right of his but only to fix an obligation on him. *Vide* Williams on Executors, page 219. It must be remembered that the 1st defendant actually entered upon his duties as executor, applied for probate and got an order in his favour but for some reasons did not actually take out a probate. He would now be estopped from saying that he is not under any obligation as executor, vide *Munisami Chetti* v. *Maruthammal*,[1] which applies the principle of *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*.[2]

The next question is whether the plaintiff has any rights over the estate of the deceased Appaswami Pillai. On this part of the case the contesting defendant is the 4th defendant. He has got a mortgage for 2½ lakhs and he claims priority in respect of his mortgage over the plaintiff's legacy. It must be observed that the mortgage was, as already pointed out, so far as the items binding on the estate and amounting to Rs. 1,00,615 are concerned, is a mortgage properly executed by the executor and binding on the estate and, therefore, binding on the legatees also. The question is, whether, in respect of the other items, the mortgage has priority over the plaintiff's legacy. It is true that under section 307 of the Act an executor has power to dispose of the property for all purposes binding upon the estate and, even where the executor deals with the property for purposes not strictly binding on the estate, the alienations such as a sale or mortgage cannot be questioned so as to defeat the *bona fide* alienee who had no notice of the fact that the executor was using his powers for purposes not binding upon the estate. This principle has been well established and it is clear from Lord Thurlow's oft-quoted dictum. *Vide* Williams on Executors, pages 697 and 698; but where the alienation is made for purposes not binding on the estate and the alienee has notice of the fact, the principle does not apply. *See* footnote (*n*) in Williams on Executors, page 697 and *Bank of*

1. (1910) I.L.R. 34 M. 211: 20 M.L.J. 687.
2. (1911) L.R. 38 I.A. 129: I.L.R. 34 M. 257: 21 M.L.J. 669 (P.C.).

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Bombay v. *Suleman Somji.*[3] In this last case their Lordships of the Privy Council after distinguishing the English cases of *Graham* v. *Drummond*[4] and *Taylor* v. *Hawkins*[5] held that an alienee with notice of the fact that the executor was using it for his own purposes will not be protected. We think that the decision applies to the present case. The decision in *Henson In re; Chester* v. *Henson*[6] does not help the respondent. That decision only shows that the purchaser or mortgagee is not bound to see to the application of the mortgage money and that the executor need not expressly describe himself as executor in the instrument. This is perfectly true; but in this case the purpose for which the document was executed was partly not for the benefit of the estate and on the face of the document this was known to the mortgagee. I am, therefore, of opinion that the plaintiff is entitled to recover the amount of the legacy from the estate subject to the mortgage, Ex. A-3, to the extent of Rs. 1,00,615 and it's interest and but without being subject to the mortgage for the rest of the amount.

The next question that arises is whether the plaintiff can recover any amount on the promissory note. It is said that the promissory note is for an immoral consideration. On this point I am inclined to agree with the view of the Trial Judge and not with the Bombay cases such as *Husseinali* v. *Dinbai*[7] and *Kisondas* v. *Dhondu*[8] relied on by Mr. Radhakrishnayya. In the English Law past immoral consideration is good consideration if the document is under seal not because of the immorality but because in English Law past consideration is no consideration. In Indian Law past consideration is good consideration and as there is nothing immoral in remunerating a woman who has rendered services for such past services, the consideration is good. Vide *Lakshminarayana Reddiar* v. *Subhadri Ammal,*[9] *per* Bhashyam Aiyangar, J., with whose judgment I agree. I am unable to agree with the judgment of Sundaram Chetty, J., in *Ganapati Chetti* v. *Sundararaja Pillai.*[10] Whether such consideration can act as a motive both for legacy and for any number of promises may perhaps be doubted; but it is unnecessary to pursue this matter further as I am of opinion that in the circumstances of this case that the promissory note was

3. (1908) L.R. 35 I.A. 139: I.L.R. 33 B. 1: 18 M.L.J. 435 (P.C.).
4. (1896) 1 Ch. 968.
5. (1803) 8 Ves. Jun. 209: 32 E.R. 334.
6. (1908) 2 Ch. 356.
7. (1923) 25 Bom. L.R. 252.
8. (1919) I.L.R. 44 B. 542.
9. (1902) 13 M.L.J. 7.
10. (1929) M.W.N. 828.

not intended to give an additional sum of Rs. 15,000 besides the sum of Rs. 15,000 given by the letter, Ex. A-6, Mr. Varadachariar, the learned Advocate for the appellant, relied on *Horlock* v. *Wiggins*; *Wiggins* v. *Horlock*.[11] In that case the first deed was recited in the will as the argument of Mr. Stokes shows. The facts of the present case are different. It looks as if the promissory note was executed by the testator with a view to make the executor also a consenting party so that he might not afterwards throw obstacles in the way of the legatee. The whole evidence shows that the 1st defendant never borrowed from Aparanji Ammal. Paragraph 3 of the written statement raised the question that the promissory note has no consideration and issue 2, though it is clumsily framed, relates to this point. It cannot be said, therefore, that the question was not raised. The evidence is very clear and in the circumstances I think that the promissory note was not intended to give an additional sum of Rs. 15,000. It is true that sections 177 and 179 do not apply to this will, but the principles of these sections as embodying the general equitable principles may apply. Vide *Hassonally Moledina* v. *Popatlal Parbhudas*.[12] But even if so, we have nothing to do with section 177 in this case, nor can section 179 help the appellant for nobody suggests that the bequest adeemed. It is conceded that the legacy stands. The only question is whether the promissory note is valid as for another additional sum. On the facts we find that it has no consideration and from the surrounding circumstances we think it refers to the same sum as the legacy. So that, even if sections 177 and 179 are actually applicable they do not help the appellant. The result is that in modification of the decree the plaintiff's suit so far as it relates to the promissory note and Appeal No. 125 of 1928 are dismissed as against 4th defendant with his proportionate costs but the decree as against the 1st defendant and Official Assignee will stand as it has not been appealed against. In Appeal No. 66 of 1928 a decree will be given as indicated above with interest at 6 per cent. which is the interest provided for in the Act. The plaintiff will have proportionate costs in the suit and in appeal on the amount decreed.

In A.S. No. 66 there will be a preliminary decree for administration on the above lines and this Court will as far as possible try to satisfy the claim of plaintiff out of properties not included in the mortgage of the 4th defendant.

11. (1888) 39 Ch.D. 142.
12. (1912) I.L.R. 37 B. 211.

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Cornish, J.—There can, I think, be no doubt that the letter, Ex. A-6, is a testamentary instrument. It says:

"My dear Doray, My present state of health seems to me uncertain, if I should depart this life you will pay to my beloved second wife M. Aparanji Ammal the sum of Rupees Fifteen thousand and you will take the whole of my property both moveable and immoveable I am possessed of."

The words are informal but they clearly express the writer's wishes as to the disposal of his property on the event of his death. It has been contended that as the testator gives the whole of his property to defendant 1, the "Doray" to whom Ex. A-6 is written, the direction with regard to the payment of Rs. 15,000 to Aparanji Ammal cannot be read as giving her a legacy. But if the testator's intention was to make a bequest to her, as I think it was, it cannot signify whether the testator instead of giving the bequest of Rs. 15,000 directly to Aparanji directed the defendant, his executor, to pay this sum to her. The question, then, is whether Ex. A-6 is to be regarded as a codicil to the earlier will, Ex. A-5, which the testator made in Madras on the 11th August, 1915, and of which defendant 1 was the executor and residuary legatee. "Codicil" is defined by section 2 (*b*), Indian Succession Act, as meaning "an instrument made in relation to a will and explaining, altering or adding to its disposition and is considered as forming an additional part of the will." Ex. A-6 does not in terms refer to the will, but is addressed to the person who was appointed executor of the will; it directs him to pay a legacy which had not been given by the will, and it confirms the residuary bequest made to him by the will. It revokes nothing in the will. The legacy given to M. Srinivasa Pillai by the earlier will appears to have been adeemed; at all events, the properties bequeathed to Srinivasa Pillai no longer formed part of the testator's estate at the time of his death. In these circumstances I am of opinion that Ex. A-6 must be regarded as "an instrument made in relation to a will and adding to its disposition" and consequently a codicil to the will. It is also to be noted that the testator's signature to the document is attested by two witnesses in conformity with the requirements of a valid will governed by the Indian Succession Act.

The codicil was made at Guindy, outside the limits of the High Court's Original Civil Jurisdiction and, in addition to the pecuniary legacy given to Aparanji, it confirmed by repetition the residuary bequest given to defendant 1 by the will comprising immoveable property within the High Court limits.

The executor (defendant 1) applied for probate of the will and codicil, and a grant was ordered, but no grant has been issued because the executor has not paid the appropriate Court-fee for the grant. Does the failure to produce probate prevent the plaintiff, who derives his title to the legacy as administrator of Aparanji's estate, from establishing his claim to the legacy?

Section 213 (1), Indian Succession Act, 1925, says:

"No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed."

But sub-section (2) provides:

"This section shall not apply in the case of wills made by . . . any Hindu . . . where such wills are of the class specified in section 57."

Now, the class of the will specified in section 57 (1) comprises (*a*) all wills and codicils made by any Hindu on or after September 1, 1870, within the local limits of the High Court's Ordinary Original Civil Jurisdiction, and (*b*) all such wills and codicils made outside those limits "so far as relates to immoveable property situate within those limits." The classification is taken from the Hindu Wills Act (XXI of 1870) now repealed. This Act applied to these classes of wills and codicils certain sections of the Indian Succession Act, 1865, corresponding to the sections set out in Schedule III of the Indian Succession Act, 1925, which have now been made applicable to such wills and codicils. The purpose, as explained in the preamble to the Hindu Wills Act, was "to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the wills of Hindus within the territories subject to the Lieutenant-Governor of Bengal, and in the towns of Madras and Bombay." By a later amendment of Act XXI of 1870, section 187 of the 1865 Act (which corresponds with section 213 (1) of the 1925 Act) was made applicable to these classes of wills and codicils. Section 187 adopts the English rule that the probate is the only legal evidence of the will in any question respecting a right to property under the will, or, as it has been said, it is only when the will has been proved that the Court has the legal optics through which to look at it: *Johnson* v. *Warwick*.[13] As a general rule, no doubt, if probate of a will is necessary, any codicil is included in the probate, because the codicil is part of the will. But it is obvious from the classification of wills and codicils in section 57 (1), clauses (*a*) and (*b*), that a will and codicil may have to be treated as separate instruments for the purpose

13. (1856) 17 C.B. 516.

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of the application of section 213 (1) and the other relevant sections of the Indian Succession Act. A will or a codicil made within the prescribed limits comes within clause (*a*) and is governed by the applied sections of the Indian Succession Act, but a will or a codicil made outside the prescribed limits comes within clause (*b*) and is governed by those sections "so far as relates to immoveable property situate within those limits." The plain meaning of these words is that in respect of a will or of a codicil coming within clause (*b*), section 213 (1) applies only to the extent of the will or codicil disposing of immoveable property within the prescribed limits, but does not otherwise apply to the instrument. There is nothing very strange in such an exception being made when it is remembered that in England formerly, the Court of Probate had no jurisdiction to authenticate a will so far as it related to real estate and that the probate was no evidence at all of the validity or contents of a will as to such property. (*See* Williams on Executors, Vol. I, page 440, (10th Edition), and Burn's Ecclesiastical Law, Vol. IV, pp. 332, 335). Upon this construction, probate of a will or of a codicil within the category of section 57 (1), clause (*b*) of the Indian Succession Act, is not required as evidence of the will or codicil so far as any right to moveable property is concerned. It follows that the plaintiff's claim to the pecuniary legacy under the codicil was maintainable without probate.

The next question is whether the plaintiff can claim, in addition to the legacy, a sum of Rs. 15,000 due under a promissory note jointly executed in favour of Aparanji by the testator and the executor. The date of the codicil is 19th October, 1920, and the date of the pro-note is the 22nd October, 1920. The two instruments are, therefore, practically contemporaneous. Reference has been made to *Horlock* v. *Wiggins*; *Wiggins* v. *Horlock*[11] where a husband by a separation deed, dated 7th September, 1844, covenanted that his executors or administrators should, on his decease, pay to his wife £100 if she survived him; and by his will executed on the 9th September, 1844, he gave his wife £100 after payment of all his just debts. In holding that there was no presumption that one gift was intended to be in satisfaction of the other, Cotton, L.J., said:

"In my opinion no such presumption arises in this case. The direction to pay the legacy is given after payment of all the testator's just debts, and the instrument creating an obligation to pay the £100, which would be a debt, is so nearly connected in point of time with the execu-

11. (1888) 39 Ch.D. 142.

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tion of the will that they must be treated as contemporaneous. I do not say that in no case can a presumption of satisfaction arise where the documents are contemporaneous."

And Bowen, L.J., said:

"Then, again, the two documents, as regarded the testator's mind, were contemporaneous, which is a circumstance to be considered, for the presumption arises not on the will, but on the circumstances of the case."

Looking at the circumstances in which the pronote was executed and particularly to the fact that the note was executed by the testator and his executor, the latter being under no obligation of any sort to Aparanji when he executed the note, it seems to me that the proper inference is that the note was intended to be no more than an additional security to Aparanji for the payment of the legacy, and the testator did not intend her to have both the legacy and the amount covered by the pronote. In this view it becomes unnecessary to consider the question whether the note is supported by consideration. The result is the same as that arrived at by the learned Trial Judge except that the plaintiff is entitled to the balance of Rs. 15,000 as legacy and not as payable under the pronote. The rate of interest payable on a legacy when the testator is a Hindu is fixed by section 353, Indian Succession Act, at 6 per cent. and under section 351 interest begins to run from the expiration of one year from the testator's death. I agree, for the reasons given by my learned brother, that the mortgage in favour of 4th defendant to the extent to which it was raised for paying off the testator's liabilities has priority over payment of the legacy, but that the legacy has priority over the mortgage to the extent of the amount borrowed by defendant 1 for the satisfaction of his present debts.

K.C. ——— *Decree modified.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD TOMLIN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Jitendra Nath Ghose and others .. *Appellants**

v.

Monmohan Ghose and others .. *Respondents.*

P. C.

Jitendra Nath Ghose *v.* Monmohan Ghose.

Bengal Tenancy Act (VIII of 1885), Ss. 12, 13, 65 and 67—Rent decree —Inclusion of interest at 75 per cent.—Transferee of tenure—Parties to rent suit—Statutory notice to landlord presumed—Suit for declaration and

*P.C. Appeal No. 109 of 1928. 29th April, 1930.
Bengal Appeal No. 24 of 1926.

P. C.

Jitendra Nath Ghose
v.
Monmohan Ghose.

to restrain execution against tenure—Indian Limitation Act, 1908, *Art.* 120 —Terminus a quo.

Under the Bengal Tenancy Act, 1885, having regard to the provisions of Ss. 65 and 67, a decree for arrears of rent which includes interest not due, and not recoverable as rent, is not a proper rent decree which can be executed by a sale of the tenure under Chapter XIV.

Under the Act of 1885 (differing, in this respect, from the previous law), a transferee of a tenure is not bound by a decree for arrears of rent obtained by the landlord against the recorded tenant whose interest in the tenure had then in fact ceased, and an effective rent decree can only be obtained against the transferee when he is impleaded as a party-defendant in the suit for such rent.

Chintamoni Dutt v. *Rash Behari Mondul,* (1891) I.L.R. 19 Cal. 17 and *Surapati Roy* v. *Ram Narayan Mukerji,* (1923) L.R. 50 I.A. 155: I.L.R. 50 Cal. 680: 45 M.L.J. 219 (P.C.), referred to.

In the case of a transfer of a permanent tenure, whether voluntarily or in execution of a decree, it will be presumed, in the absence of evidence to the contrary, that the procedure laid down by Ss. 12 and 13 of the Bengal Tenancy Act was duly followed, and that the proper statutory notice was given, through the Collector, to the landlord.

A suit by the transferee of a tenure for a declaration of his title and that the defendant-landlord has no right to have it sold in execution of an alleged rent decree, and for an injunction restraining him from so selling, is within Art. 120 of the Indian Limitation Act, 1908, and the "right to sue," within the meaning of that Article, accrues when the landlord first applies for the sale of the tenure, and not at the date of the passing of the rent decree.

The effect of S. 170 (1) of the Bengal Tenancy Act is only that there can be no investigation, in execution proceedings held under Chap. XIV of the Act, of claims by third parties to an interest in the tenure, but it does not bar a substantive suit by the transferee of a tenure for a declaration of title and exemption from execution, nor can the section be invoked where the landlord seeks to utilise the machinery of Chap. XIV for the recovery of something that is not rent at all.

Appeal No. 109 of 1928 from a judgment and decree, dated the 25th March, 1926, of the High Court, Calcutta, which reversed a judgment and decree, dated the 24th December, 1923, of the Subordinate Judge of Khulna.

The defendants-appellants were landlords of a permanent Darganti tenure, and they obtained three decrees in suits: (1) No. 8 of 1911, (2) No. 26 of 1915, and (3) No. 11 of 1919. The High Court held, differing from the Subordinate Judge, that the said decrees were not decrees for rent, and could not be executed under the provisions of Chapter XIV of the Bengal Tenancy Act, 1885, and they gave the plaintiffs-respondents the declaratory relief as prayed for.

Against the said decree, the defendants appealed to His Majesty in Council.

De Gruyther, K. C. and *Parikh* for appellants.

Dunne, K. C. and *Dube* for respondents.

De Gruyther, K. C., for appellants.—The decree in question is a rent decree under the Bengal Tenancy Act and can be

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executed against the tenure. The only person I am obliged to sue is the registered tenant, and if I sue the registered tenant, the decree binds the tenure.

Sections 12 *et seq* of the Act of 1885 show that if there is any transfer by the tenant, the landlord shall be notified. Before the Act of 1885, notice was given to the landlord directly. Now it has to be given through the Collector. I submit that if no notice is given to the landlord, he is not bound to recognise anybody as a tenant except the person recorded in his register.

The proposition I submit is this: If the landlord gets a decree for rent against any person who is recorded as tenant in the landlord's roll of tenants, the decree is binding on all persons who claim through such tenant, or have an interest in the tenure (*Shamchand Kundu* v. *Brojonath Pal Chowdhry*[1], *Rash Behary Bundopadhya* v. *Peary Mohun Mookerjee*[2], *Panye Chunder Sircar* v. *Hurchunder Chowdhry*[3], *Jeo Lal Singh* v. *Gunga Pershad*[4] and *Fakir Chunder Dutt* v. *Ram Kumar Chatterjee*[5]).

There is no decision laying down that when a subsequent purchaser is not impleaded as a party-defendant the decree for rent is vitiated. The tenure is bound if the landlord obtains a decree against persons who are recorded as tenants in his *sherista*.

As the tenure was created before the Act of 1885 came into force, the stipulation as to interest at 75 per cent. could be given effect to: Ss. 67 and 178 and *Madhu Mala* v. *Alfazuddi Kazi*[6]. The judgment of Jenkins, C.J., in this case shows that the mere fact that interest at 75 per cent. is included does not prove that it is not a rent decree.

We submit, further, that the suit is time-barred. The plaintiff's right to sue accrued, under Article 120 of the Limitation Act, at the date when the rent decrees were passed, and not when an application was made to execute them.

Dunne, K.C., for respondents.—Under the Act of 1885 the landlord is bound to sue the person who is the transferee of the tenure. The landlord had to bring the suit against me

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1. (1873) 12 B.L.R. 484: 21 W.R. 94 (F.B.).
2. (1878) I.L.R. 4 C. 346.
3. (1884) I.L.R. 10 C. 496.
4. (1884) I.L.R. 10 C. 996.
5. (1904) L.R. 31 I.A. 195: I.L.R. 31 C. 901 (F.B.).
6. (1909) 13 C.W.N. 962.

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as transferee. If he did not choose to make me a party, I am not bound.

The decisions under the new Act lay down that a transfer is valid, irrespective of the question whether the landlord had notice of it or not. Under the Act there is no obligation on the transferee to give notice of transfer to the landlord. The system which existed prior to 1885 does not survive under the new Act: *Kristo Bulluv Ghose* v. *Kristo Lal Singh*[7], *Mahomed Abbas Mondul* v. *Brojo Sundari Debia*[8], *Chintamoni Dutt* v. *Rash Behari Mondul*[9], *Hemendra Nath Mukerji* v. *Kumar Nath Roy*[10], *Surapati Roy* v. *Ram Narayan Mukerji*[11] and *Baistab Charan Chowdhury* v. *Akhil Chandra Chowdhury*[12]. The transfer is now complete as soon as the document is registered: *Kristo Bulluv Ghose* v. *Kristo Lal Singh*[7].

It is admitted that all the heirs of the deceased tenants were not made parties to the rent suits. To have a valid decree for arrears of rent under the Act, the landlord must join all the heirs of the tenant as parties to the action: *Srimati Faijunnessa* v. *Ramtaran Chowdhury*[13], *Kailash Chandra Mitra* v. *Brojendra K. Chakravarti*[14] and *Abinath Chandra Roy* v. *Fulchand Chaudhuri*[15].

On the question of interest at 75 per cent. there has been a vital change in this respect under the Act of 1885. S. 67 lays down in terms a statutory rate of interest on arrears of rent, and nothing in excess of the rate is recoverable under the Act.

De Gruyther, K.C., replied.

29th April, 1930. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The appellants are the owners of a *ganti* tenure known as Dahar Nalbunia in the Khulna District. On the 26th January, 1885, shortly before the passing of the Bengal Tenancy Act (VIII of 1885) the predecessor-in-title of the appellants created a *dar-ganti* or under-tenure in favour of three ladies (hereinafter referred to as the *dar-gantidars*) at an annual rent of Rs. 629-11-0 payable in four *kists* or instalments. By the terms of the *kabuliyat* then

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7. (1889) I.L.R. 16 C. 642.
8. (1891) I.L.R. 18 C. 360 (F.B.).
9. (1891) I.L.R. 19 C. 17.
10. (1908) 12 C.W.N. 478.
11. (1923) L.R. 50 I.A. 155: I.L.R. 50 C. 680: 45 M.L.J. 219 (P.C.).
12. (1906) 11 C.W.N. 217.
13. (1920) 26 C.W.N. 138.
14. (1925) 29 C.W.N. 1000.
15. (1923) I.L.R. 50 C. 737.

executed by the *dar-gantidars* this tenure was non-transferable, and provision was made for default as follows:—

"In case of default in payment of any *kist* we shall pay the whole amount of the *kist* together with half of it by way of interest within the period from the date following the date of the *kist*, up to the 30th Chaitra of the same year. Besides the rent, we shall pay along with it all existing and future Government cesses, etc., according to the aforesaid *Kistibundi*, and in case of default of any *kist* we shall without any objection pay interest thereon in the way as stipulated above. If the rent for a year be not paid within the year, then we shall cease to have any right to or concern with the property on the 1st day of Baisakh of the next year. You will be entitled to take *Khas* possession of the same without instituting any suit and without giving any notice, and the arrears of rent with interest for the year, together with interest on the same at the rate of 1 anna per rupee per month from the 1st day of Baisakh of the following year up to the date of realisation of the same shall be recovered from our other moveable and immoveable properties and from our persons."

The effect of this was that upon any instalment of the rent being in arrear interest at the rate of 50 per cent. would be payable up to the end of the year, and that if a year's rent was unpaid the landlord would be entitled to re-enter, and the arrears and interest then due would carry further interest at 75 per cent. per annum recoverable from the *dar-gantidars* personally.

These terms, however, were in effect modified by the operation of the Tenancy Act which came into force in November, 1885. The *dar-ganti* which, it is now admitted, was heritable, was a "permanent tenure" within the meaning of the Act, and therefore became under S. 11 transferable; and by S. 65 the *dar-gantidars* ceased to be liable to ejectment for arrears of rent, but their tenure was liable to be sold in execution of a rent decree, and the rent was made a first charge thereon. It was also provided by S. 67 that arrears of rent should bear simple interest at the rate of 12 per cent. per annum which was raised by a later Act to 12½ per cent.

From 1899 onwards the *dar-gantidars* appear to have been in difficulties. They incumbered the tenure: the rent was not paid: rent suits were filed against them and decrees were passed. None of these suits seem to have been defended and the decree in each case included, in addition to the 50 per cent. interest on arrears, interest upon the aggregate sum due at 75 per cent. which was clearly chargeable only in the event of re-entry—an event which had not, and could not under the provisions of the new Act, have taken place.

It is with the last three of these decrees dated respectively the 14th June, 1911, the 18th August, 1915, and the 7th Nov-

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ember, 1919, that this appeal is concerned. After 1899 the *dar-gantidars* practically disappear from the scene, though their names, or as one or other of them died, the names of some of their heirs continued to be recorded in the landlord's *sherista*, and they figured as defendants in the regularly recurring suits for the rent. In the case of the earlier decrees prior to 1911 the decretal amount was paid, apparently without demur, by one or other of the incumbrancers, and a maze of proceedings resulted which are detailed in the judgments of the Indian Courts, but need not be further referred to here. It is sufficient to state that by 1911 the *dar-gantidars* and their heirs had ceased to have any interest in the tenure which it is now admitted eventually vested in the respondents, subject to a charge in favour of one Hiramati who was not a party to the proceedings out of which this appeal has arisen.

The three decrees now in question were obtained against the one survivor of the *dar-gantidars* and such of the heirs of the other two as were known to the appellants, and included (as stated above) interest upon the arrears at 75 per cent. None of the incumbrancers or execution purchasers to whom the real interest in the tenure had passed were at any time entered in the landlord's *sherista*, nor were they made parties to any of the suits, or recognised in any way by the appellants who contended, relying upon the terms of the *kabuliyat*, that the tenure was not transferable. This contention was maintained by them in the earlier stages of the present proceedings, though in view of the provisions of the Act of 1885 it has not been supported before this Board.

In the case of the later decrees from 1911 onwards no payment was made, and apart from keeping them alive it does not appear that any effective step towards realisation was taken by the appellants until April, 1921, when they applied for execution by attachment and sale of the tenure. This brought the respondents into action, and in November of the same year they filed the suit out of which this appeal has arisen in the Court of the Subordinate Judge of Khulna. The prayer of their plaint was for a declaration of their title to the tenure, and that the appellants had no right to have it sold in execution of the decrees above referred to, and for an injunction restraining them from selling. The appellants defended the suit, their principal contentions being that the tenure was not transferable, that the decrees were good rent decrees binding on the tenure which could therefore be brought to sale in execution, and that the suit was out of time. The Trial Judge decided the first two

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points in the appellants' favour, and holding that the respondents had no title dismissed the suit. He did not think it necessary to come to any conclusion on the question of limitation.

The High Court on appeal reversed his decree, the main ground of the decision being that the decrees were not rent decrees which could be executed by sale of the tenure inasmuch as the 75 per cent. interest which was included in them was not due, and could not be recovered, as rent. The learned Judges held that the respondents had acquired by purchase a right in the tenure though they thought it unnecessary to define its exact nature, and they granted the respondents a declaration to that effect and that the tenure could not be sold in execution, and an injunction as prayed.

Before their Lordships it has not been seriously disputed that the inclusion in the decrees of the 75 per cent. interest, which was payable only on re-entry by the landlord, was wrong, and that this amount could not properly be charged on the tenure. But the argument for the appellants has been that they were entitled to bring their suits against the tenants recorded in their rent rolls, disregarding any transfer of their interests, and that having obtained decrees against them in rent suits filed under the Act of 1885 they had a statutory right to bring the tenure to sale, which could not be resisted by third parties whatever their interest in the tenure might be, and that no such third party could impugn the propriety of the decrees so passed.

Their Lordships find themselves unable to accede to this argument. Before the Act of 1885 came into force the duty was laid specifically upon the transferee of a tenure to see that his name was recorded in the landlord's *sherista,* and it may well have been that, if he failed without good reason to do this, he could not be heard to object to a decree passed against the recorded tenants, even though their interest in the tenure had in fact ceased. But the Act of 1885 made a radical change in this respect. Instead of the transferee being bound to go to the landlord to get his name recorded, it was provided that a voluntary transfer must be by a registered instrument, and that before registration a fee was to be paid by the transferee and notice given by the registration office, through the Collector, to the landlord, or in the case of an execution sale by the executing court. In this state of the law their Lordships can see no foundation for the contention that a landlord can ignore all transfers of the tenure and rely upon decrees obtained by him against persons whom he chooses for his own purposes still to

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record as his tenants, though he knows, or must be taken to know, that their interest in the tenure has ceased.

In the present case their Lordships have no doubt that the landlord had notice of the other interests which had come into existence. There is uncontradicted evidence to this effect in the record, and in the case of the earlier decrees the predecessor-in-title of the appellants accepted payment from persons whom she must have known were incumbrancers. But apart from this their Lordships have no hesitation in presuming, in the absence of evidence to the contrary, that the procedure laid down by Ss. 12 and 13 of the Act was duly followed, and that the proper statutory notice was given of the various incumbrances and execution sales from which the respondents' title has evolved. That the appellants did not choose to record the names of the transferees is neither here nor there; the reason for their not doing so was almost obviously that they were unwilling to recognise the transferability of the tenure. If it was, as is now admitted, statutorily transferable, their Lordships know of no principle of law, nor have they been referred to any provision of the Act, which justifies the contention of the appellants. It would, indeed, appear from the decision of the Board in *Surapati Roy* v. *Ram Narayan Mukerji*[11] and other cases decided in India (see, for instance, *Chintamoni Dutt* v. *Rash Behari Mondul*[9]) that the original tenure-holders would no longer be liable for the rent, and that an effective decree, therefore, could only be obtained against the transferees. But, in the present case, it being clear to their Lordships that the decrees which the appellants claim to execute by the sale of the tenure were not, for the reasons assigned by the High Court, proper rent decrees, they think it is impossible to hold that the respondents are bound by them.

Reliance has been placed by counsel for the appellants upon S. 170 (1) of the Tenancy Act, which made Ss. 278 to 283 of the Civil Procedure Code of 1882 (now O. 21, rr. 58 to 63 of the Code of 1908) inapplicable to a tenure attached in execution of a decree for arrears of rent. The effect of this provision is that there can be no investigation in execution proceedings held under Chap. XIV of the Tenancy Act, of claims by third parties to an interest in the tenure, but it does not, in their Lordships' opinion, bar a substantive suit such as that filed by the respondents. In their Lordships' view it is only arrears of

9. (1891) I.L.R. 19 C. 17.
11. (1923) L.R. 50 I.A. 155: I.L.R. 50 C. 680: 45 M.L.J. 219 (P.C.).

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rent that are charged by S. 65 upon the tenure, and it is only such arrears that can be realised in execution by the sale of the tenure. Chap. XIV of the Act does not purport to enlarge or restrict the exercise of this right, but only provides the machinery for working it out. If a landlord seeks to use this machinery for the recovery of something that is not rent, to the prejudice of a third party on whom the decree is not binding, it would be a manifest injustice to deny him the right to object, and it would require very clear words in the Act to induce their Lordships to impose this penalty upon him.

It only remains to deal with the question of limitation. The contention of the appellants is that the suit, not having been brought within six years of the passing of the first two of the three decrees in question, is barred in respect of them by Art. 120 of the First Schedule to the Limitation Act (IX of 1908). The respondents admit that this article governs the suit, but say that their "right to sue," which defines the starting point of the period, only accrued in April, 1921, when the appellants first applied for the sale of the tenure, and their suit was brought in November of that year. The Trial Judge (as already stated) made no pronouncement upon this issue. The learned Judges of the High Court agreed with the respondents' contention, and their Lordships have no doubt that they were right for the reasons given in their judgment.

Their Lordships think that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Stanley, Johnson and Allen.*

Solicitors for respondents: *Watkins and Hunter.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD THANKERTON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Rajendra Prasad Bose and another .. *Appellants**

v.

Gopal Prasad Sen .. *Respondent.*

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Hindu Law—Authority to adopt—Construction of—English rules—Applicability of—Adoption with permission of named person—Adoption

*P.C. Appeal No. 112 of 1929. 26th June, 1930.
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after death of that person and without his consent—Validity—Consent, if a condition precedent—Motives for adoption—Official translation of documents.

The fundamental rules as to the construction of documents are the same in England and in India. While the Court must, no doubt, have regard to the surrounding circumstances, and, in the case of a document executed by an Indian, to the fact that his surroundings, his manners, etc., are often different from those of an Englishman, the duty of the Court is to ascertain the real intention of the executant from the words used by him in the document itself. In short, the Court is bound to carry out the intention *as expressed* and no other: *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row,* (1913) L.R. 41 I.A. 51 at 70, 71 and 72: I.L.R. 37 M. 199: 26 M.L.J. 411 (P.C.), referred to.

The ordinary rule as to the construction of powers which prevails in England (as, for instance, that when a power is given to be executed with the consent of a person, and that person dies before the power is executed, the power comes to an end), is generally applicable to the construction of an *Anumatipatra* executed in India.

Authority given to a wife to adopt has to be strictly pursued: *Chowdury Pudum Singh* v. *Koer Oodey Singh,* (1869) 12 Moo. I.A. 350 at 356 and *Surendrakeshav Roy* v. *Doorgasundari Dassee,* (1891) L.R. 19 I.A. 108 at 122: I.L.R. 19 C. 513 (P.C.), relied on.

Religious grounds, namely, to secure his spiritual benefits, are not the only motives which actuate a husband to empower his wife to adopt a son to him. There may be secular motives, as, for instance, to continue his line of ancestors and to inherit his property and keep up his own name. Generally both motives induce the husband to empower the wife to adopt a son to him, and whether the paramount intention is religious or secular has to be ascertained from the language of the *Anumatipatra*: Mayne's Hindu Law, 6th Ed., p. 134 (7th Ed., para. 106), referred to.

One Ram Prosad, a Kayastha Bengali Hindu, governed by the Dayabhaga Law, executed, on the 16th February, 1869, a power in favour of his wife to adopt a son to him. He died on the same day. The *Anumatipatra* stated that his widow was to adopt "my father's youngest son, Chema . . . . If there be any obstacle to take him in adoption according to the Shastras, then . . . . she may adopt any one else whom she wants, with the permission of my father." The father died in 1873, and the widow, in 1885, adopted one Krishna Prosad.

Held, that, on the true construction of the *Anumatipatra,* that the words "with the permission of my father" in the *Anumatipatra* created a condition precedent to the exercise of the power of adoption, and therefore on the death of the father in 1873 the power to adopt given to the widow came to an end, and consequently the adoption of Krishna Prosad by the widow in 1885 was invalid. Observations of Lord Hobhouse in *Amrito Lal Dutt* v. *Surnomoye Dasi,* (1900) L.R. 27 I.A. 128 at 134: I.L.R. 27 C. 996 (P.C.), relied on.

The practice of their Lordships' Board is to accept official translations of documents as correct: *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury,* (1921) L.R. 49 I.A. 25 at 31: I.L.R. 1 Pat. 305 at 311: 42 M.L.J. 492 (P.C.), followed.

Judgment of the High Court, Patna, reversed.

Appeal No. 112 of 1929 from the decree of the High Court, Patna, dated the 16th December, 1927, which affirmed a decree of the Subordinate Judge at Cuttack, dated the 6th August, 1923, and dismissed the plaintiffs' suit.

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The material facts of the case, as well as the pedigree of the parties concerned, are set out in their Lordships' judgment.

From the said decree of the High Court, Patna, the present appeal was preferred by the plaintiffs *in forma pauperis* by special leave to His Majesty in Council.

Wallach for appellants.

De Gruyther, K.C. and *Hyam* for respondent.

26th June, 1930. Their Lordships' judgment was delivered by

Sir Binod Mitter.

Sir Binod Mitter.—This is an appeal from the decree of the High Court of Judicature at Patna, dated the 16th December, 1927, which affirmed a decree of the Subordinate Judge at Cuttack, dated the 6th August, 1923, and dismissed the plaintiffs' suit with costs.

The following is the genealogical table of the family of Ram Prosad Bose, and the parties to the litigation claim to be his heirs:—

Unamoyee (1st wife) = Golak Prosad (died 26th October, 1873) = Alhadini Dasi (2nd wife).

Ram Prosad Bose (died 16th Feb., 1869) = Alhadini *alias* Gangamoni (died 7th Sept., 1920)

Gobinda Prosad (decd. plff. No. 1) | Sananda Prosad (plff. No. 2). | Binode Prosad (plff. No. 3). | Sonaton Prosad (deceased).

Rajendra (plff. No. 1).

Ram Prosad Bose executed a will and also an Anumatipatra in favour of his wife Alhadini Dasi on the 16th February, 1869.

Alhadini Dasi, the widow, adopted one Krishna Prosad in the year 1885, and he died in 1909 leaving the respondent his only heir in possession of the properties claimed by the appellants. Alhadini died on the 7th September, 1920, and the present suit was instituted by the appellants against the respondent on the 25th April, 1921, praying for a declaration that the adoption of Krishna Prosad was invalid, and for the recovery of the properties in possession of the respondent and other incidental reliefs.

There is no dispute now about the valid execution of the will or the Anumatipatra, nor is there any dispute that Krishna Prosad was in fact adopted, and that all necessary and proper ceremonies were performed at his adoption.

Ram Prosad belonged to a Kayastha family, and was governed by the Bengal School of Hindu Law, and the widow

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therefore could only adopt in terms of the Anumatipatra, provided the same remained effective at the date of the adoption.

The following is the official translation of the Anumatipatra:—

"Anumatipatra executed by Ram Prosad Bose in favour of Alhadini Dasi.

"This Anumatipatra is executed by Ram Prosad Bose of Bhogmadhab, Ph. Jajpur, District Cuttack, at present of Bichargunj, Ph. Sunhat, District Balasore, to the effect following:—

"That as I was taken ill with purging and vomiting yesterday, I found that it was not likely that I should live. In the circumstances I find that it is necessary that I should have an adopted son or a Snehaputra, (to inherit) the Zemindaries, etc., the moveable and immoveable properties, which I have in Balasore and Cuttack. Hence in sound mind and out of my own free will I execute this Anumatipatra in favour of my wife Alhadini, *alias* Gangamoni Dasi, to the effect that she will take an adopted son, that is, she will adopt my father's youngest son. At present he is called by the name of Chema. She will take him in adoption and deliver him possession of the aforesaid property on my death. If there be any obstacle to take him in adoption according to the Shastras, then he will be made a Snehaputra or she may adopt anyone else whom she wants, with the permission of my father, and deliver him possession as written above. To the above effect I execute this Anumatipatra that it may be of use when necessary. Dated 16th February, 1869, corresponding to 7th Falgun, 1276."

The learned Subordinate Judge, in his judgment, translated the vernacular word "matanusara" as "according to the opinion or advice," but the official translation of the aforesaid word is "with the permission."

Mr. Justice Ross, in his judgment, accepted the official translation in its entirety, and the other learned Judge substantially did the same. The practice of their Lordships' Board is to accept the official translation as correct (*Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* [1]) and their Lordships must decide this appeal on the official translation.

Both the Courts below have held that there was an obstacle to take Chema, the testator's step-brother, in adoption, and their Lordships see no reason to differ from that view.

The substantial question before their Lordships for decision is whether on the true construction of the Anumatipatra, on the death of Golak Prosad,* the power to adopt given to the widow by Ram Prosad came to an end.

In England, as also in India, even where a document is executed in vernacular, the fundamental rule of construction is the same. The duty of the Court is to ascertain the intention

1. (1921) L.R. 49 I.A. 25 at 31: I.L.R. 1 Pat. 305: 42 M.L.J. 492 (P.C.).

*Golak Prosad, the testator's father, died in 1873, and in 1885 the widow adopted Krishna Prosad, father of the present defendant.—*K.J.R.*

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from the words used in the document. The Court is entitled and bound to bear in mind surrounding circumstances, but the Court does that only to ascertain the real intention of the executant from the words used by him. The surroundings of an Indian, his manners, his outlook proceeding from different religion and social customs, are often different from those of an Englishman. Ordinarily documents executed by an Indian in his own language, particularly without any professional aid, are often expressed in loose and inaccurate language. All these considerations have to be borne in mind, and sometimes by reason of these aforesaid circumstances a more extended or restricted meaning may have to be given to particular words than their exact literal meaning permits, provided always that the context justifies it. In short, the Court is entitled to "put itself into the testator's armchair." Once the construction is settled, the Court is bound to carry out the intention as expressed and no other. The rules of construction were clearly laid down by the Board in *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row.*[2]

It is true that the paramount intention that often actuates a husband to empower his wife to adopt a son to him is religious, for, according to Hindu religion, the adopted son is able to confer on him at stated intervals spiritual benefits in a much higher degree than his brothers or any other near agnatic relations. On the other hand, sometimes a husband mainly from secular motives empowers his wife to adopt a son or sons to continue his line of ancestors and to inherit his property and keep up his own name (*see* Mayne's Hindu Law, 6th Ed., p. 134).

Generally both motives induce the husband to empower the wife to adopt a son to him, and whether the paramount intention is religious or secular has to be ascertained from the language of the Anumatipatra, bearing in mind the various facts to which their Lordships have referred.

It is well-established law in England that when a power is given to be executed with the consent of a person, and that person dies before the power is executed, the power comes to an end.

Their Lordships see no reason why, *subject to what they have said*, the ordinary rule as to construction of powers which prevails in England should not be applicable to the construction

2. (1913) L.R. 41 I.A. 51 at 70, 71, 72: I.L.R. 37 M. 199: 26 M.L.J. 411 (P.C.).

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of an Anumatipatra executed in India. Their Lordships are fortified in their view by the observations of the Board in the case of *Amrito Lal Dutt* v. *Surnomoye Dasi.*[3] Their Lordships find from the document that the paramount intention was to have an adopted son to *inherit the Zemindaries.* Instructions were given that the properties not disposed of by the will should be made over to the adopted son. The Anumatipatra nowhere suggests that the adoption was to secure the spiritual benefit of Ram Prosad.

It is important to bear in mind that Ram Prosad could not have been married many years before the Anumatipatra was executed, and his wife was then only 13 or 14 years of age. It is unlikely that he could ever have wished that his girl wife should have an unrestricted choice in the selection of his adopted son to the extent of allowing her to bring a stranger to inherit his property.

In their Lordships' opinion the words "with the permission of my father" created a condition precedent to the exercise of the power of adoption certainly during the lifetime of the father, and there is no reason for holding that the words are to have a different effect after the death of Golak. It is well-established law in India that authority given to a wife to adopt has to be strictly pursued. (*Chowdhury Pudum Singh* v. *Koer Oodey Singh*[4] and *Surendrakeshav Roy* v. *Doorgasundari Dassee*[5]).

Their Lordships therefore hold that on the death of Golak the power to adopt came to an end.

Counsel for the respondent argued that in order to give effect to the true intention of Ram Prosad the words "if possible" should be added after the words "with the permission" in the Anumatipatra. Their Lordships are unable to accept this contention, and they are of opinion that the appeal should be allowed, and there should be a decree for ejectment against the respondent with mesne profits from the death of Alhadini to the date when possession is delivered to the appellants. The plaintiffs are also entitled to the declaration that Krishna Prosad was not the adopted son of Ram Prosad.

The appellants were unsuccessful in most of the issues raised by them, and in their Lordships' opinion each party should

3. (1900) L.R. 27 I.A. 128 at 134: I.L.R. 27 C. 996 (P.C.).
4. (1869) 12 Moo. I.A. 350 at 356.
5. (1892) L.R. 19 I.A. 108 at 122: I.L.R. 19 C. 513 (P.C.).

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bear his or their costs in the Courts below, but the appellants should have such costs of this appeal as they are entitled to as appealing *in forma pauperis.* They will therefore humbly advise His Majesty accordingly.

Solicitors for appellants: *W. W. Box & Co.*

Solicitors for respondent: *Barrow, Rogers and Nevil.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province, Peshawar.]

PRESENT:—LORD TOMLIN, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Musammat Bolo .. *Appellant**

v.

Musammat Koklan and others .. *Respondents.*

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Mt. Bolo *v.* Mt. Koklan.

Hindu Law—Will—Construction—Expressed intention—Indian Limitation Act, 1908, *Articles* 120, 123 *and* 127—*"Right to sue"—Suit by Hindu widow for partition and possession—Limitation applicable.*

In construing the will of a Hindu testator, while it is no doubt legitimate to take into consideration what are known to be the ordinary motives and wishes of a Hindu with respect to the devolution of his property, the primary duty of a Court of construction is to give to the words of the will their plain and natural meaning. In other words, even in the case of a Hindu will, where the language is specific and unambiguous, the Court must construe the words as they find them and give effect to the intention of the testator *as expressed* in the will itself.

Under Art. 120 of the Indian Limitation Act, 1908, the *terminus a quo* is, "when the right to sue accrues"; and there can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

A Hindu widow, who under the terms of her deceased husband's will, became entitled absolutely to a moiety of his property on the death of her son in 1918, brought this suit in 1927 for partition and possession against the son's widow.

Held: (1) That if Art. 123 or 127 of the Limitation Act (12 years' limitation) was applicable, the suit was clearly within time.

(2) That even, if Art. 120 (six years' limitation) applied as regards the claim to the moveable properties, the suit was within time, inasmuch as though the plaintiff's right to the property arose on the death of her son, there was (on the finding of fact of the Court below), no infringement of, or any clear and unequivocal threat to, her rights till within six years before suit.

Appeal and cross-appeal (No. 106 of 1929) from a judgment and decree, dated the 12th October, 1928, of the learned

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*P.C. Appeal No. 106 of 1929. 3rd July, 1930.

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Judicial Commissioners, North-West Frontier Province, Peshawar, which set aside the decree, dated the 31st January, 1928, of the District Judge, Peshawar, and granted the plaintiff, Mt. Koklan, a decree for possession by partition of one-quarter of the property in the suit as a limited owner.

The main questions in the appeal of Mt. Bolo (the contesting defendant) and in the cross-appeal of Mt. Koklan (the plaintiff) were the same:

(*a*) Whether, on the true construction of the will, dated the 27th May, 1896, of one Kanhaya Lal, an Arora Hindu of Peshawar City, who died in September, 1899, and in the events which happened, his widow, Mt. Koklan (the plaintiff), was given any separate or independent share of his property, either as a joint tenant or tenant-in-common with her minor son, Tara Chand, and either absolutely or for life, and what was the extent of such share; and

(*b*) whether, if she was given any such share, her claim to possession by partition thereof was barred by limitation, the suit having been brought on the 13th July, 1927, more than six years after the death of her son Tara Chand in 1918.

The material passages from the will, as translated, are set out in their Lordships' judgment.

The District Judge held that the plaintiff, Mt. Koklan, never became owner under the terms of the will, but that she only acquired an interest contingent on the death of her son Tara Chand during minority and without issue. The learned Judicial Commissioners, on appeal, took a different view. In their opinion, "the effect of the will was to confer an absolute estate on the son (Tara Chand) and a limited estate on the widow (Mt. Koklan)". They, therefore, held that "the plaintiff is entitled to hold one-quarter of the property as a limited owner, and that as such she is entitled to separate that share by partition."

The plaintiff (Mt. Koklan) as well as the defendant (Mt. Bolo) appealed to His Majesty in Council against the said decree of the Appellate Court.

Dunne, K.C. and *Joseph Nissim* for appellant.

De Gruyther, K.C. and *Dube* for respondents.

Dunne, K.C., for appellant (Mt. Bolo).—On a true construction of the will, Tara Chand, minor, having survived the testator, the half share in question was given to the minor son as owner absolutely in conjunction with the customary right to suitable maintenance of the Hindu widow. This right was a charge on the estate and vested in Mt. Koklan, the plaintiff. In the events which happened, she did not become owner

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of any separate or independent share of the property in suit and has no right to claim partition or possession. *Jamna Das* v. *Ramautar*[1] and *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*[2] referred to.

In any case, the suit is time-barred. Art. 123 is inapplicable. That article is restricted to a suit in which a plaintiff seeks to obtain his legacy or share from a person who, either as an executor, administrator, or otherwise, represents the estate of a deceased person, and is under a legal obligation to pay legacies and distribute shares to those entitled to them. *Sithamma* v. *Narayana*[3], *Issur Chunder Doss* v. *Juggut Chunder Shaha*[4], *Keshav Jagannath* v. *Narayan Sakharam*,[5] *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah*[6] and *Mahomed Riasat Ali* v. *Mt. Hasin Banu*.[7] The decision in *Shirinbai* v. *Ratanbai*[8] (at pp. 857, 858, 860) is based on a misunderstanding of the ruling of the Privy Council in *Maung Tun Tha* v. *Ma Thit*[9]. That is no authority for the broad proposition that Art. 123 applies to every suit in which the plaintiff seeks to recover, from any one in possession of the estate, an undistributed share of the estate of an intestate. Art. 123 is restricted to suits against executors, administrators and other persons who rightly represent the estate, as laid down in the earlier decisions of the High Courts in India, prior to the pronouncement of the Board in *Maung Tun Tha* v. *Ma Thit*[9]. If Art. 123 is inapplicable, the other article applicable is 120 and the suit is barred. Refers to *Nurdin Najbudin* v. *Bu Umrao*[10] and *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao*[11]. The ruling in *Maung Tun Tha* v. *Ma Thit*[9] is distinguishable; there Art. 123 was applied because the lady represented the estate.

De Gruyther, K.C. for respondent, Mt. Koklan (plaintiff).—The suit is for a declaration of title and partition. It is extremely difficult to say what the Legislature contemplated by the words "right to sue" in Art. 120, assuming that article to

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1. (1904) I.L.R. 27 A. 364.
2. (1921) L.R. 49 I.A. 25: I.L.R. 1 Pat. 305: 42 M.L.J. 492 (P.C.).
3. (1889) I.L.R. 12 M. 487.
4. (1882) I.L.R. 9 C. 79.
5. (1889) I.L.R. 14 B. 236.
6. (1910) I.L.R. 34 M. 511: 20 M.L.J. 288 (F.B.).
7. (1893) L.R. 20 I.A. 155: I.L.R. 21 C. 157 (P.C.).
8. (1918) I.L.R. 43 B. 845.
9. (1916) L.R. 44 I.A. 42: I.L.R. 44 C. 379: 32 M.L.J. 71 (P.C.).
10. (1920) I.L.R. 45 B. 519.
11. (1922) I.L.R. 46 M. 190: 43 M.L.J. 486 (F.B.), on appeal (1925) L.R. 52 I.A. 214: I.L.R. 48 M. 312: 48 M.L.J. 627 (P.C.).

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be applicable. Refers to Mitra's Limitation, Tagore Lectures, Vol. II, p. 1051. Directly the right is denied, the right to sue accrues. Refers to section 42, Specific Relief Act. Nobody is compelled to sue for a declaration, until his right is denied; and from the moment of denial, the party has six years within which he can bring his suit.

As regards Art. 123, the earlier decisions, for instance, in *Issur Chunder Doss* v. *Juggut Chunder Shaha*[4] and *Keshav Jagannath* v. *Narayan Sakharam*[5], took one view and the more recent decisions another view. The suit here is clearly for a share of the residue and comes under Art. 123.

The third alternative is Art. 127. Also in the case of joint tenants, no period of limitation applies and time would run only when the plaintiff's rights are infringed. "Exclusion" has not here been made out against the plaintiff. Reference was also made to *Jitendra Nath Ghose* v. *Monmohan Ghose*[12] in which the right to sue was held to accrue only when execution was taken out by the sale of the tenure being applied for, and not when the rent decree was passed.

Dunne, K.C., replied.

3rd July, 1930. Their Lordships' judgment was delivered by

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SIR BINOD MITTER.—These are two consolidated appeals, one by the plaintiff, Mt. Koklan, and the other by the defendant, Mt. Bolo, from a judgment and decree, dated the 12th October, 1928, of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar, which reversed a judgment and decree, dated the 31st January, 1928, of the District Judge of Peshawar, and made a decree partly allowing the plaintiff's claim and partly dismissing it.

Kanhaya Lal executed his last will and testament on the 27th May, 1896, and died in the year 1899, leaving surviving his sole widow the plaintiff, Mt. Koklan, his infant son Tara Chand, and his great nephew Mohan Lal, as will appear from the following pedigree:—

4. (1882) I.L.R. 9 C. 79. 5. (1889) I.L.R. 14 B. 236.
12. (1930) L.R. 57 I.A. 214: 59 M.L.J. 607 (P.C.).

SULTAN SINGH.

- Wisakhi Ram
  - Moti Ram
- Jul Mal
  - Musammat Sarasti
    - Mohan Lal (died 1910)
      - Surjan Das (died 1918)
        - Sant Ram (Defendant No. 1)
        - Hari Ram, minor (Defendant No. 2)
- Kanhaya Lal (died 1899) = Musammat Koklan (Plaintiff)
  - Musammat Nikki
  - Musammat Bhappo
  - Tara Chand (died 1918) married Musammat Bolo (Defendant No. 3)
    - Mehr Chand (died March, 1927, aged 10 years)

The properties left by Kanhaya Lal consisted of movables and immovables. They were self-acquired and were not ancestral.

Two questions are before their Lordships for their decision in this appeal:

(1) What is the interest of the plaintiff and the defendant Mt. Bolo in the property left by Kanhaya Lal?

(2) Is the claim of the plaintiff in this suit barred by limitation?*

The important clause in the will is the 4th, and it runs as follows:—

"If I die, my real son, Tara Chand, minor, aged 2 years, may be held and considered as proprietor of half of the whole property specified in the will, jointly with Mt. Koklan, his mother. If, God forbid, the mother of the said Tara Chand, minor, dies before him, then the said Tara Chand shall become the owner of the said half share and in case Tara Chand, minor, dies before his mother, then the latter shall be held and considered to be the owner of the said minor's half share in the entire property. Mt. Koklan shall act as guardian of the person and property of Tara Chand during his minority. It is further noted here that if Tara Chand is not present, *i.e.*, if he dies, then Mt. Koklan shall be competent in every respect to alienate the said half share in the property by way of Dharam Khata, etc. (*i.e.*, charitable purposes, etc.) but she shall have no power to alienate by gift or by other way any portion of the said property either to her parents or relations on her mother's side.

"As regards the remaining one-half share of the property noted in the will, it shall go to Mohan Lal, son of Narinjan Das, caste Arora (by profession a physician) of Mohallah Kocchi Khan ilaqa Dabgari gate, Tahsil Peshawar, who is the son of my brother's daughter, and after his death his children shall succeed to this half share of the property."

Tara Chand died in 1918, leaving him surviving his sole widow Mt. Bolo and an infant son Mehr Chand. The question

*The present suit was instituted by Mt. Koklan on the 13th July, 1927.
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for decision is whether on Tara Chand's death his mother, Mt. Koklan, became entitled absolutely to a moiety of the estate left by Kanhaya Lal and, if not, then what on the construction of Kanhaya Lal's will is the interest of Mt. Koklan or of Mt. Bolo.

Counsel for Mt. Bolo submitted that the testator by the words "In case Tara Chand, minor, dies before his mother, then the latter shall be held and considered to be the owner of the said minor's half share in the entire property" intended that the interest which Tara Chand was to acquire under the will would go over to his mother *only if Tara Chand died before the testator or if he died during his minority*, but not otherwise.

He further submitted that in construing this will, which is the will of a Hindu, it is proper to take into consideration what are known to be the ordinary motives and wishes of a Hindu with respect to the devolution of his property, and that a Hindu, except in rare cases, would not deprive his sons or grandsons of their rights of inheritance, or even curtail the same, for the benefit of his widow.

No doubt the submission of the learned Counsel is perfectly legitimate and proper, but the primary duty of a Court of construction is to give to the words of the will their plain and natural meaning, and the words of this will are specific. Their Lordships think that, whilst they must give due weight to the submission of the learned Counsel, they must construe the words as they find them. They, therefore, hold that the intention of the testator *as expressed* was that the defeasance clause would come into operation on the death of Tara Chand, if the same happened during the lifetime of his mother, and cannot be restricted in the way that Counsel suggested. The answer to the first question propounded is, therefore, that on the death of Tara Chand Mt. Koklan became entitled to a moiety of the property left by Kanhaya Lal and that Mt. Bolo has no interest therein.

The learned District Judge found the facts as follows:—

"When Kanhaya Lal died, Mohan Lal managed the property. On his death Surjan Das managed it and a year or two later Tara Chand also took part in the management. On the death of Surjan Das and Tara Chand, agents were appointed under registered powers of attorney by Mts. Sarani and Bolo, the mothers of the minors Sant Ram, Hari Ram and Mehr Chand, to manage the property and that arrangement has been continuing up to date. The account books of the property show that the income has been credited half and half to the two branches of Sultan Singh's descendants: an allowance of Rs. 20 per mensem has been made to Mt. Koklan and it has been debited all along first to Tara Chand's

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account and later to Mehr Chand's. Since the death of Surjan Das and Tara Chand the mothers of the minors have been receiving from the property a sum of about Rs. 400 a month for their various expenses. Kanhaya Lal's widow and descendants continued to live jointly until 4 or 5 years ago when Mts. Koklan and Bolo began to live separately."

The Court of the Judicial Commissioner did not come to any different finding and their Lordships accept the finding of the learned District Judge as correct.

A suit was filed on the 11th July, 1922, on behalf of the infant Mehr Chand by his mother Mt. Bolo against the two minor sons of Surjan Das through their mother for partition and possession of the properties left by Kanhaya Lal in equal shares. Mt. Koklan petitioned to be added as defendant, denying that her minor grandson had any right at all and claiming under the will to be the absolute owner of the half share in suit. The suit was subsequently withdrawn with liberty to bring a fresh suit.

On these facts the question arises whether the claim of the plaintiff is barred by limitation.

Learned counsel for Mt. Bolo argued that Art. 120 applies to this suit in respect of the movable properties, and that when Tara Chand died the right to sue accrued to the plaintiff and the suit as regards the movable properties is therefore barred by limitation.

Learned counsel for the plaintiff, Mt. Koklan, also submitted that Art. 120 of the Limitation Act is applicable but that the right to sue did not accrue until Mehr Chand on the 11th July, 1922, instituted the suit which was subsequently withdrawn. He further submitted that if Art. 120 did not apply, then Art. 127 or 123 is applicable. If Art. 127 or 123 is applicable, then the suit is clearly within time, but even if Art. 120 applies to this suit, then their Lordships are of opinion that the suit is within time.

Art. 120 is as follows:—

Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years.	When the right to sue accrues.

There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

No doubt Mt. Koklan's right to the property arose on the death of Tara Chand, but in the circumstances of this case

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their Lordships are of opinion that there was no infringement of, or any clear and unequivocal threat to, her rights till the year 1922, when the suit, as stated above, was instituted.

Mt. Koklan was living as a member of a joint family, consisting of herself, her infant grandson, and daughter-in-law, and they constituted Kanhaya Lal's branch of the family of Sultan Singh.

The grant of powers-of-attorney by Mts. Sarani and Bolo to a manager to manage the joint property, and the method in which the account books were kept, show the way in which the joint properties were managed. Such methods of management are not uncommon amongst Hindus.

Their Lordships, therefore, hold that the suit is not barred by limitation. They are of opinion that the appeal of Mt. Bolo should be dismissed and that of Mt. Koklan allowed, and that the following declaration should be made: That on the true construction of the will the plaintiff is entitled to an absolute interest in the one-half share in which she and Tara Chand were interested at the time of the latter's death, but this declaration is without prejudice to the question whether any, and if so to what extent, the restriction on alienation imposed by the will of Kanhaya Lal is valid.

It follows, therefore, that Mt. Koklan is entitled to a decree for partition and that this suit should be remitted to the learned District Judge to carry out the directions of their Lordships. The appellant, Mt. Bolo, must pay the costs of Mt. Koklan before this Board. There will be no order for costs in the Courts below and any costs paid under any order should be returned to each other respectively. The costs of partition would be dealt with by the learned District Judge.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed.*

[*Reporter's Note.*—As regards Art. 123 of the Limitation Act, see the recent decisions reported in *Rustam Khan* v. *Janki*, (1928) I.L.R. 51 A. 101, *Mussammat Jano* v. *Narsingh Das*, (1929) I.L.R. 11 L. 29, *Bai Jivi* v. *Bai Bibanboo*, (1928) 31 Bom. L.R. 199 and *Ma Bi* v. *Ma Khatoon*, (1929) I.L.R. 7 R. 744, which were not cited before the Board.—K.J.R.]

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE SUNDARAM CHETTY AND MR. JUSTICE PAKENHAM WALSH.

Moonrumugamkondan Asari .. *Appellant** (*Deft.*)

v.

Chockalingam Asari .. *Respondent* (*Plff.*).

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Moonrumugamkondan Asari
v.
Chockalingam Asari.

Insolvency—Articles entrusted to insolvent for sale—Suit by insolvent to recover them or their value from third person—Suit filed as bailee—Maintainability—Doctrine of reputed ownership if applicable.

The plaintiff, who was a goldsmith, was entrusted in the ordinary course of his business by a certain person with some emeralds in order to have them sold. He handed them over to the defendant for sale and the latter not having returned the articles, or their value, he sued to recover the same. The plaintiff was on the date of suit an undischarged insolvent. He sought to recover from the defendant not only the value of the articles as payable to the owner, but also an additional sum of money alleged to be due to him by way of commission. The latter claim was, however, negatived by all the Courts and the suit resolved itself into one for recovering the value of the articles on behalf of the owner. An objection having been taken to the maintainability of the suit,

Held, that the property in the articles entrusted did not vest in the insolvent so as to pass to the Official Receiver and the suit, being one filed by the plaintiff in his capacity as bailee, was not rendered unsustainable because of his insolvency.

Held, further, that it could not be said, under the circumstances, that the emeralds or their value were the reputed property of the insolvent.

Williams on *Bankruptcy,* 13th Ed., pp. 229 and 230, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A.S. No. 171 of 1926 (A.S. No. 37 of 1926, District Court, Tinnevelly) preferred against the decree of the Court of the District Munsif of Tinnevelly in O.S. No. 390 of 1924.

G. T. Ramanujachari for appellant.

B. Sitarama Rao and *K. Venkateswaran* for respondent.

The Court (Anantakrishna Aiyar, J.) made the following

Anantakrishna Aiyar, J.

ORDER OF REFERENCE TO A FULL BENCH.—The plaintiff and defendant are goldsmiths. The plaintiff is an undischarged insolvent. The plaintiff alleged that he got emeralds from one Sita Lakshmi Ammal for sale and that he gave it to the defendant for sale. The price was fixed at Rs. 1,000 and it was agreed that the excess realised by the defendant by the sale should be shared equally between the plaintiff and the defendant.

*S.A. No. 1431 of 1927. 30th July, 1930.

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Anantakrishna Aiyar, J.

The plaintiff sued to recover Rs. 1,000 the price of the emeralds and for Rs. 250 being the plaintiff's share of the profits made by the defendant, on the allegation that the defendant sold the emeralds for Rs. 1,500. The plaintiff asked for the return of the emeralds in case they were not sold by the defendant.

Among other contentions the defendant raised the plea that the plaintiff was an undischarged insolvent and was consequently not entitled to sue. Issue 6 raised the question "Is the plaintiff an undischarged insolvent not entitled to sue?" The first Court found that the plaintiff was an undischarged insolvent but that he could maintain an action for recovery of the articles bailed. The first Court gave the plaintiff a decree for Rs. 1,000. On appeal the Lower Appellate Court found that the defendant's story of the loss of the emeralds at the railway station was not proved, and fixing the value of the emeralds at Rs. 800 gave the plaintiff a decree for Rs. 800 only. I heard the appeal on the merits and was about to deliver judgment on the merits of the case, when it was brought to my notice that the question whether an undischarged insolvent could maintain a suit with reference to after-acquired properties was referred to a Full Bench in Letters Patent Appeal No. 204 of 1925. I accordingly adjourned the case till the Opinion of the Full Bench is delivered. I am now informed that the Letters Patent Appeal abated since the legal representative of some deceased party was not brought on record, and consequently the Letters Patent Appeal was dismissed, the question not being decided by the Full Bench.

The suit was brought, not simply to recover the value of the emeralds but to recover Rs. 250 also being the plaintiff's share of the alleged profits. The Official Receiver would be interested in prosecuting the claim as regards the profits, since it would be to the benefit of the estate of the creditors. The present is not, therefore, a suit brought for the recovery of articles bailed, but the question of the insolvent being entitled to certain profits in connection with the transaction has also been raised in the suit. The case, therefore, in my opinion involves the insolvent's right to after-acquired property. The appellant has raised the question that the suit as framed is not maintainable by the plaintiff who is admittedly an undischarged insolvent.

The question whether the undischarged insolvent could maintain a suit regarding his after-acquired properties subject to the right of the Official Receiver to intervene in such suit was referred to the decision of a Full Bench by the late learned Chief

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Justice and Mr. Justice Madhavan Nair in L.P.A. No. 204 of 1925. As that appeal was not proceeded with on the death of one of the parties, the Full Bench had not to consider the question nor give an opinion. As the question arises in the present second appeal, and as the matter is one of general importance, and for reasons stated in the order of reference to the Full Bench made in the above Letters Patent Appeal where the case-law on the point including the latest observations by the Privy Council in *Kala Chand Banerjee* v. *Jagannath Marwari*[1] is discussed, it seems to me that this Second Appeal should be placed before the learned Chief Justice for consideration under R. 6 of the Appellate Side Rules whether the question should be referred for decision by a Full Bench. In case the learned Chief Justice should so order, the question that arises for the decision of a Full Bench is the following:—

"Is it open to an undischarged insolvent to maintain a suit regarding his after-acquired properties, subject to the right of the Official Receiver to intervene in such proceedings?"

G. T. Ramanujachari for appellant.

R. Krishnaswami Aiyangar and *K. Venkateswaran* for respondent.

The Court expressed the following

OPINION. *The Chief Justice.*—The question referred to us for decision is— Beasley, C. J.

"Is it open to an undischarged insolvent to maintain a suit regarding his after-acquired properties subject to the right of the Official Receiver to intervene in such proceedings?"

In our view, upon the facts of this case this question does not arise and we are not disposed to enter into any further discussion of this question which is purely one of academic interest.

The facts of the case may be quite shortly stated. The insolvent was the plaintiff in the District Munsif's Court. He was also an undischarged insolvent. His case as set out in the plaint was that he got emeralds from one Sita Lakshmi Ammal for sale and that he gave them to the defendant in the suit for sale. The value of the emeralds was fixed, so he alleges, at Rs. 1,000 and it was agreed that the excess realised by the defendant by the sale should be shared equally between the plaintiff and the defendant. He sued to recover the emeralds or Rs. 1,000 the price of the emeralds and for Rs. 250 being his share, as he alleged, of the profits made by the defendant

1. (1927) L.R. 54 I.A. 190: I.L.R. 54 C. 595: 52 M.L.J. 734 (P.C.).

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on the allegation that the defendant sold the emeralds for Rs. 1,500 and he asked for the return of the emeralds in case they were not sold by the defendant. Amongst other contentions the defendant raised the plea that the plaintiff was an undischarged insolvent and was consequently not entitled to sue. An issue was taken upon that contention and the District Munsif found that the plaintiff was an undischarged insolvent, but that he could maintain the suit for recovery of the articles bailed. I wish to draw particular attention to the fact that the articles were described by the District Munsif as articles bailed. Then there was an appeal and the first Appellate Court fixed the value of the emeralds at Rs. 800 and gave the plaintiff a decree for that amount only. The case came up on second appeal to this Court and the question of the maintainability of a suit by an insolvent with reference to after-acquired property was raised and in view of the fact that a Letters Patent Appeal raising this very point was then pending decision by a Full Bench, our learned brother Anantakrishna Aiyar, J., adjourned the case until the Opinion of the Full Bench was delivered. The Letters Patent Appeal, however, abated and the matter again came before our learned brother who, in view of what appears to be a difference of view in a case decided by Krishnan and Odgers, JJ., in *Ramanatha Aiyar* v. *Nagendra Aiyar* [2] and a later decision of the Privy Council in *Kala Chand Banerjee* v. *Jagannath Marwari*[1] referred the case to us.

Upon the facts of this case the plaintiff's suit was divided into two parts: (1) relating to his commission of Rs. 250—that claim has been held against, and (2) for the return of or the value of the emeralds which he handed over to the defendant for sale. In our view, the first essential in the appellant's case is that the emeralds themselves or their cash value should vest in the Receiver as the after-acquired property of the insolvent under S. 28 of the Provincial Insolvency Act. That section deals both with the actual property of an insolvent at the time of his adjudication and property which may pass into his possession after the adjudication. In the case of property coming into his possession after adjudication—it is after-acquired property—that shall forthwith vest in the Receiver. There is another class of property dealt with in that section and that is the reputed property of the insolvent. Upon the facts

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1. (1927) L.R. 54 I.A. 190: I.L.R. 54 C. 595: 52 M.L.J. 734 (P.C.).
2. (1923) 45 M.L.J. 827.

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of this case the value of the emeralds can in no sense of the word be described as the property of the insolvent. His own case was that this property was given to him by Sita Lakshmi Ammal for sale. He was a jeweller and goldsmith and so was the defendant. So that in the ordinary course of business, according to his own case, these emeralds were entrusted to him for sale. That statement in his case completely negatives any position occupied by him other than as a bailee of goods for sale and it is important to remember that this statement that there had been an entrustment to the insolvent of these emeralds as a bailee is not controverted anywhere in the written statement of the defendant. Clearly the emeralds were not the property of the insolvent but it has been urged before us that although they are not the property of the insolvent, they may yet be his reputed property.

Where goods, precious stones and such like things are given into the hands of a goldsmith or a jeweller either for the purpose of being converted into ornaments or for sale, they are given to him in the ordinary way of his business; and assuming that at the time of his adjudication he is in possession of those jewels, clearly they are not his jewels at all but they are the jewels of the bailor and as such, being easily identifiable, do not pass to the Receiver in the insolvency. The further question arises as to what is to happen if he has recovered the proceeds of the sale. Here again if those proceeds have not been inter-mixed with the money belonging to the creditors and can easily be identified, the money does not vest in the Receiver but this case is a stronger one from the respondent's point of view because the jewels had been parted with and the insolvent had no money in his possession which he had received in respect of the sale. He claims in his suit to get that money from the defendant. If he succeeds, no one, I think, would contest that that money is clearly ear-marked as money belonging to the real owner of the jewels, namely, Sita Lakshmi Ammal up to the extent of the agreed value Rs. 1,000 and is not available at all for distribution by the Receiver amongst the creditors in the insolvency. This matter, I think, is made perfectly clear by the notes to S. 38, which is the vesting section, in the English Bankruptcy Act of Williams on "Bankruptcy," 13th Ed., p. 229. The marginal note is "Trusts arising from employment of bankrupt," and the note says:

"Lastly, then, there is the third class of trusts where the bankrupt has not the general, but only a special property, *e.g.*, where property is vested in the bankrupt as an agent, such as a factor, etc. Such property, so long

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as it or its proceeds remain distinguishable from the mass of the bankrupt's property, will not pass to the trustee of the creditors."

Then again at page 230 it is stated:

"It is always to be remembered that, although goods in the hands of an agent may be easily distinguishable, they may yet, on the bankruptcy of the agent, pass to his trustee if the principal has permitted the agent to have a possession not consistent with the ordinary usages of trade, and raising a reputation of ownership in the bankrupt."

Here the case for the plaintiff uncontradicted by the defendant in his written statement is that there was no entrustment at all which was not consistent with the ordinary usages of trade. As before stated, the insolvent was a jeweller and goldsmith and he himself says that the emeralds were entrusted to him for sale—that is what a jeweller and goldsmith does—and it cannot be said that the emeralds or their value were the reputed property of the insolvent. Under these circumstances and upon the facts of this case the question before us really does not arise. It would arise if the property were property which vested in the Official Assignee or the Receiver as the case may be. Therefore we decline to decide the question. We need express no opinion upon what would happen had the property been the after-acquired property of the insolvent. With regard to the claim for Rs. 250 no question arises with regard to that because that claim has been disallowed in all the Courts.

The case must, therefore, be dealt with by the referring Judge in the light of these observations.

B.V.V. *Question referred to the Full Bench not answered.*

[The Second Appeal came on for final disposal before Anantakrishna Aiyar, J., who, in the light of the observations made by the Full Bench, dismissed the same with costs.]

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice,* MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

S. M. S. Subramanian Chettiar (dead) and another .. *Appellants* (Plaintiff and his Estate Receiver)*

v.

Sinnammal and others .. *Respondents (L.Rs. of Defendant).*

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Civil Procedure Code (V of 1908), O. 34, R. 1—Mortgage suit—Attaching creditor whether necessary party—Sale for money-decree pending suit

*L. P. Appeal No. 72 of 1925. 17th April, 1930.

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on mortgage—Later sale in execution of mortgage-decree—Attaching creditor's right under S. 91 (*f*), *Transfer of Property Act, if extinguished—O.* 41, *R.* 33—*Scope—Respondent not filing cross-appeal or memorandum of objections—Power of Appellate Court to interfere.*

The plaintiff who was a money-decree-holder against the judgment-debtor-mortgagor attached the mortgaged property in execution of his decree. Pending the attachment, the defendant-mortgagee filed a suit upon his mortgage and obtained a preliminary decree. To this suit, however, the plaintiff was not made a party. Subsequently, the plaintiff brought the property to sale in pursuance of the attachment and purchased it himself. The defendant thereupon proceeded to obtain a final decree, and purchased the same property at the sale held by Court in execution of that decree. The plaintiff filed a suit alleging that the defendant was in unlawful possession of the property and claimed that he was entitled to redeem the property from the mortgage in favour of the defendant. The District Munsif decreed redemption by the plaintiff on payment of a certain sum of money to the defendant. The plaintiff having appealed on the ground that the sum he was ordered to pay was too large, the Subordinate Judge allowed the defendant at the hearing to raise the plea that the suit itself was not maintainable and dismissed the suit *in toto.* The judgment of the Appellate Court having been affirmed in second appeal, and the plaintiff having preferred a Letters Patent Appeal,

Held (by Coutts Trotter, C.J., Beasley and Madhavan Nair, JJ.) that the Lower Appellate Court had jurisdiction to exercise its discretionary powers under O. 41, R. 33, Civil Procedure Code, in favour of the respondent by dismissing the plaintiff's suit *in toto,* though the respondent did not prefer a cross-appeal or memorandum of objections challenging the decree passed by the first Court. In such cases the question whether the interference by the Appellate Court was justified or not should be decided on the circumstances of each case.

Jawahar Bano v. *Shujaat Husain Beg,* (1920) I.L.R. 43 A. 85 and *Debendra Narain Sinha* v. *Narendra Narain Sinha,* (1919) 24 C.W.N. 110, referred to.

Rangam Lal v. *Jhandu,* (1911) I.L.R. 34 A. 32 (F.B.) and *Ramalingam Chettiar* v. *Subramania Chettiar,* (1927) I.L.R. 50 M. 614: 52 M.L.J. 612, considered.

Held, further, (by Beasley, C.J., Anantakrishna Aiyar and Curgenven, JJ.) that the plaintiff was not a necessary party to the mortgage suit within the meaning of O. 34, R. 1, Civil Procedure Code, and that the right to redeem conferred on him as attaching creditor under section 91 (*f*), Transfer of Property Act, ceased to be available to him after the property had been sold in execution of his decree.

Veyindramuthu Pillai v. *Maya Nadan,* (1919) I.L.R. 43 M. 696: 39 M.L.J. 456, and *Chamiyappa Tharagan* v. *Rama Aiyar,* (1920) I.L.R. 44 M. 232: 40 M.L.J. 65, approved,

Decision of Srinivasa Aiyangar, J., affirmed on both points.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Srinivasa Aiyangar, dated the 22nd day of August, 1924, and passed in Second Appeal No. 88 of 1922 preferred to the High Court against the decree of the Court of the Additional Subordinate Judge of Madura in A.S. No. 96 of 1920 (A.S. No. 224 of 1920, District Court, Madura) preferred against the decree of the

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Court of the Second Additional District Munsif of Madura in O.S. No. 10 of 1918.

The facts of the case are fully set out in the Order of Reference to the Full Bench and also in the judgment of Madhavan Nair, J.

T. L. Venkatarama Aiyar for appellants.

P. R. Srinivasan for respondents.

The Court (Sir Murray Coutts Trotter, C.J., and Anantakrishna Aiyar, J.) made the following

Anantakrishna Aiyar, J.

ORDER OF REFERENCE TO A FULL BENCH.—*Anantakrishna Aiyar, J.*—Plaintiff is the appellant in this appeal. In execution of a money-decree obtained by the plaintiff against Subbiah Pillai in O.S. No. 650 of 1910, the plaintiff attached the suit properties in October, 1913. Subsequently the plaintiff himself purchased the property in Court-auction on 9th March, 1914. The sale was confirmed on 9th April, 1914 and the plaintiff got delivery of property in enforcement of the sale certificate on 2nd December, 1914. The sale to the plaintiff was subject to a hypothecation in favour of Peria Ravutha Goundar for Rs. 200 over the suit property.

Peria Ravuthu Goundar filed a suit (O.S. No. 537 of 1913) on 19th November, 1913, to recover money due on his hypothecation bond, making Subbiah Pillai party-defendant. The present plaintiff, however, was not made a party to that suit. The defendant, after obtaining the preliminary and final decrees in Suit No. 537 of 1913, himself purchased the properties in Court-auction on 27th March, 1916.

On the allegation that the defendant got into possession of the properties by trespass in May, 1916, the plaintiff filed the present suit on 2nd February, 1917, against Peria Ravutha Goundar for redemption of the defendant's mortgage for Rs. 200, dated 11th August, 1905, mentioned above. The defendant pleaded that he was the owner of the properties and that the plaintiff was not entitled to redeem.

The Court of First Instance decreed redemption by the plaintiff on payment of Rs. 830-8-5 to the defendant.

The plaintiff preferred an appeal to the Lower Appellate Court on the ground that the amount he was directed to pay for redemption was too large and that he was entitled to redeem on payment of a smaller amount. At the hearing of the appeal, the learned Subordinate Judge came to the conclusion that the plaintiff was not entitled to any right of redemption at all, and consequently not only dismissed the plaintiff's appeal but

reversed the decree of the first Court in plaintiff's favour and dismissed the suit *in toto*.

Two questions of law have been raised in the appeal to the High Court, one relating to the plaintiff's right to redeem and the other whether the Lower Appellate Court had jurisdiction in an appeal preferred by the plaintiff, not only to dismiss the plaintiff's appeal but further to reverse the decree passed in plaintiff's favour by the first Court, even though the respondent had not preferred any memorandum of objections or an independent appeal questioning the decree of the first Court.

To appreciate the first question it is necessary to state that the first Court relying on the decision reported in *Venkata Seetharamayya* v. *Venkataramayya*[1] decided that a money decree-holder who had attached the mortgaged properties ought to have been made a party to the suit subsequently filed by the mortgagee to recover money due on the mortgage and that such attaching decree-holder was entitled to redeem the mortgage. It would appear that a later decision of the High Court dissenting from the view taken in *Venkata Seetharamayya* v. *Venkataramayya*[1] was reported in the Law Reports [*Chamiyappa Tharagan* v. *Rama Aiyar*[2]] shortly before the appeal was heard by the Lower Appellate Court. Consequently according to the later ruling of the High Court, the plaintiff could not claim any right of redemption and consequently his suit for redemption ought to have been dismissed.

But the defendant had not preferred any independent appeal nor filed any memorandum of objections in the plaintiff's appeal questioning that portion of the decree passed by the District Munsif upholding the plaintiff's right to redeem. The Lower Appellate Court however was of opinion that under Order 41, Rule 33, Civil Procedure Code, the Appellate Court had jurisdiction to reverse even that portion of the first Court's decree though it had not been appealed against; and having regard to the circumstances of the case, it held that a case was made out for the exercise by it of the jurisdiction conferred by Order 41, Rule 33, Civil Procedure Code. Accordingly the Appellate Court not only dismissed the plaintiff's appeal but proceeded further and reversed the first Court's decree and dismissed the plaintiff's suit altogether.

It was argued before us that there is a conflict between the decision in *Venkata Seetharamayya* v. *Venkataramayya*[1] and

1. (1912) I.L.R. 37 M. 418.
2. (1920) I.L.R. 44 M. 232: 40 M.L.J. 65.

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the decision in *Chamiyappa Tharagan* v. *Rama Aiyar*[2] on the question whether the right of redemption subsists in the plaintiff in such cases.

On the question of the power of the Appellate Court to interfere even with the portion of the decree not appealed against even if it thought that decision erroneous, in the absence of an appeal or memorandum of objections, various cases were quoted before us. The question relates to a matter of practice as regards jurisdiction and powers of Appellate Courts. It is essentially necessary and expedient that the law on such a point should be definitely and authoritatively laid down.

Having regard to the two questions of law aforesaid arising in this case, and for the reasons mentioned already, we think that this appeal should be decided by a Full Bench and we accordingly refer the whole case for the decision of a Full Bench.

On this reference the Letters Patent Appeal came on for hearing in the first instance before Sir Murray Coutts Trotter, C.J., Beasley (as he then was) and Madhavan Nair, JJ.

[The arguments advanced sufficiently appear from the judgment.]

T. L. Venkatarama Aiyar for appellants.

P. R. Srinivasan for respondents.

The Court delivered the following

Madhavan Nair, J.

JUDGMENTS. *Madhavan Nair, J.*—The plaintiff is the appellant in the Letters Patent Appeal. He obtained a money-decree against Subbiah Pillai and one of his sons in O.S. No. 650 of 1910 on the file of the District Munsif's Court of Madura. In execution of that decree he attached the suit property in October, 1913. Subsequently he himself purchased it in Court auction on 9th March, 1914. The plaintiff's purchase of the property was subject to a hypothecation in favour of the defendant for Rs. 200, dated 11th August, 1905. The sale was confirmed on 9th April, 1914, and in the enforcement of the sale certificate he obtained delivery of the property on 2nd December, 1914. In the meanwhile, the defendant filed a suit (O.S. No. 537 of 1913) on his hypothecation on 19th November, 1913 and got a decree on 18th December, 1913. To this suit the present plaintiff was not made a party. In execution of his decree, the defendant purchased the property on 27th March, 1916. Alleging that the defendant is in

2. (1920) I.L.R. 44 M. 232: 40 M.L.J. 65.

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unlawful possession of the land the plaintiff filed the present suit against him for the redemption of his mortgage for Rs. 200. The defendant pleaded that he was the owner of the property and that the plaintiff was not entitled to redeem. The first issue in the case was "whether the plaintiff has the right to redeem." When the case came on for trial, the defendant conceded this point in favour of the plaintiff as under the ruling in *Venkata Seetharamayya* v. *Venkataramayya*[1] an attaching creditor has a right to redeem. The District Munsif passed a decree for redemption in favour of the plaintiff on payment of Rs. 830-8-5 to the defendant.

The plaintiff then preferred an appeal to the Lower Appellate Court on the ground that the sum he was ordered to pay was too large and that he should have been allowed to redeem on payment of a smaller amount. At the hearing of the appeal the defendant's vakil contended that the plaintiff's suit for redemption itself was not maintainable; and he represented that it was in view of the decision in *Venkata Seetharamayya* v. *Venkataramayya*[1] that an attaching creditor has a right to redeem, that he conceded before the Lower Court the plaintiff's right to redeem but that the decision in *Chamiyappa Tharagan* v. *Rama Aiyar*[2] has now negatived such a right on the part of the attaching creditor. In the circumstances, the learned Subordinate Judge allowed the defendant to raise the contention under O. 41, R. 33, Civil Procedure Code; and though there was no cross-appeal or memorandum of objections by him, he upheld his contention and not only dismissed the plaintiff's appeal but reversed the decree of the first Court in plaintiff's favour and dismissed his suit *in toto*.

Against the above decree of the Lower Appellate Court the plaintiff preferred Second Appeal No. 88 of 1922, and urged before Srinivasa Aiyangar, J., that the Subordinate Judge was wrong in holding that the plaintiff had no right to redeem and that he had no jurisdiction under O. 41, R. 33, Civil Procedure Code, to allow the respondent to raise this new plea. The learned Judge overruled both arguments and dismissed the second appeal. The present Letters Patent Appeal is against the judgment and decree of the learned Judge.

The same arguments have been addressed to us. It is first contended that the learned Judge erred in holding that the Lower Appellate Court had jurisdiction to dismiss the plaintiff's

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1. (1912) I.L.R. 37 M. 418.
2. (1920) I.L.R. 44 M. 232: 40 M.L.J. 65.

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suit under O. 41, R. 33, Civil Procedure Code, when the respondent had filed neither an appeal nor a memorandum of cross-objections challenging the decree for redemption passed by the District Munsif and the provision of this rule should be read as subject to rule 22 of the said order, the Court Fees Act and the Limitation Act, etc. In support of this contention reliance is placed upon the true scope and meaning of O. 41, R. 33, as illustrated by the decisions in *Rangam Lal* v. *Jhandu*[3], *Gangadhar* v. *Banabashi*[4], *Abjal Majhi* v. *Intu Bepari*[5], *Ramalingam Chettiar* v. *Subramania Chettiar*[6] and *Chockalingam Chetty* v. *Seethai Achi.*[7]

Order 41, Rule 33, reads as follows:—

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

Illustration.

A claims a sum of money as due to him from *X* or *Y*, and in a suit against both obtains a decree against *X*. *X* appeals and *A* and *Y* are respondents. The Appellate Court decides in favour of *X*. It has power to pass a decree against *Y*."

The rule has been newly introduced in the Code of 1908. Its object is clearly to enable the Court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the Appellate Court ample discretion to pass any decree or make any order to prevent ends of justice from being defeated. By the very terms of the order, involving as it does an exercise of judicial discretion, the question whether the Appellate Court should exercise the powers conferred by them in a particular case would no doubt depend upon the special facts and circumstances of that case. The illustration to the rule is a type of one class of cases, which calls for the exercise of the powers conferred by R. 33; but it does not by any means exhaust the class of cases in which the powers of the Appellate Court under this rule may be invoked. Having regard to the wide language of the rule it is inexpedient to lay down any hard and fast rule regarding the true scope of this provision. In a *proper case* the Courts should not hesitate to use the powers conferred upon it by this rule.

3. (1911) I.L.R. 34 A. 32 (F.B.). 4. (1914) 22 C.L.J. 390.
5. (1915) 22 C.L.J. 394.
6. (1927) I.L.R. 50 M. 614: 52 M.L.J. 612.
7. (1927) L.R. 55 I.A. 7: I.L.R. 6 R. 29: 54 M.L.J. 88 (P.C.).

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The basis for the rule may be found in O. 58, R. 4 of the Rules of the Supreme Court in England. *The Attorney-General* v. *Simpson*[8] is an instance of another class of cases justifying action under this rule. In that case, an action was brought by the Attorney-General on behalf of the public for two reliefs: (1) for a declaration that the public were entitled to the right of passage along a river including the locks without the payment of tolls; and (2) that the defendant was under an obligation to maintain the locks in an efficient state by repair. In the first Court a decree was passed declaring that the public were entitled to use the locks without payment of tolls but it was also declared that the defendant was under no obligation to repair the locks. The defendant preferred an appeal against this decree. The plaintiff did not file either a cross-appeal or a memorandum of objections. The Court of Appeal found that the public were not entitled to use the locks without payment of tolls to the defendant; at the same time the Court expressed the opinion that the defendant was under an obligation to repair the locks, and passed a decree to that effect. The learned Judges pointed out that under O. 58, R. 4, they were entitled to make this declaration notwithstanding the fact that there was no appeal by the plaintiff "against so much of the judgment which declared that the defendant was not bound to repair and maintain the works".

In none of the cases brought to our notice has it been laid down that in an appeal preferred by the plaintiff against a portion of the decree, the Appellate Court has no jurisdiction in the absence of a cross-appeal or cross-objection to dismiss the whole suit and that the utmost that the Appellate Court is competent to do is to dismiss the appeal. No doubt, the learned Judges have remarked that the provision embodied in this rule should be used with care and caution; but that does not mean that the Appellate Court has jurisdiction under it to dismiss the plaintiff's suit *in toto*. The Court is not bound to interfere in every case in which it has the power to do so; it is in this connection that the question of judicial discretion comes in. There may no doubt be cases where no excuse or justification could be found for a party not having preferred an appeal or a memorandum of objections, in which cases justice may not require the exercise of powers under Order 41, Rule 33, and the Appellate Court will be well advised in not exercising such powers.

8. (1901) 2 Ch. D. 671.

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The decision in *Rangam Lal* v. *Jhandu*[3] does not support the extreme contention urged by the appellant. In that case, the plaintiff brought a suit against the defendant for rent of a holding and obtained a decree for a portion of his claim. The plaintiff then appealed with respect to the portion of his claim dismissed by the first Court. The defendant submitted to the order in so far as it was against him and neither filed a cross-appeal nor took objections under Order 41, Rule 22, Civil Procedure Code. The District Judge remitted certain issues to the first Court and on return of the findings dismissed the entire suit of the plaintiff holding that he had power to do so under Order 41, Rule 33, even though the defendant had not appealed against that part of the decree which was against him. On appeal by the plaintiff, the learned Judges held that it was not competent to the Appellate Court acting under Order 41, Rule 33, to interfere with the decree obtained by the plaintiff in so far as it had not been challenged by the defendant.

The true purport of that decision is explained in *Jawahar Bano* v. *Shujaat Husain Beg*[9] in these words:—

"The Full Bench in that case held that, although the words of Order 41, Rule 33, were very wide and the Judge, strictly speaking, *had jurisdiction to pass the decree which he had made* (the italics are ours), still there was not a proper exercise of jurisdiction by him in that case. It was pointed out that in a case where there is no sufficient reason for a respondent neglecting either to appeal or to file objections, the Court will hesitate before allowing him to object at the hearing of the appeal."

Distinguishing the case in *Rangam Lal* v. *Jhandu*[3] with these remarks, the learned Judges upheld in *Jawahar Bano* v. *Shujaat Husain Beg*[9] the exercise of power by the Appellate Court under O. 41, R. 33, Civil Procedure Code. In that case, a decree was passed for varying amounts against three defendants, of whom two only appealed, the third not being made a party to the appeal. It was held that it was competent to the Appellate Court to modify the decree in favour of the defendant who had not appealed by decreeing the whole sum due to the plaintiffs against the defendants who had.

The decisions in *Gangadhar* v. *Banabashi*[4] and *Abjal Majhi* v. *Intu Bepari*[5] also do not in our opinion support the extreme contention urged by the appellant. The learned Judges while pointing out that

"ordinarily the power contained in Rule 33 should be limited to those cases where, as the result of the Appellate Court's interference with the decree

3. (1911) I.L.R. 34 A. 32 (F.B.).
4. (1914) 22 C.L.J. 390.
5. (1915) 22 C.L.J. 394.
9. (1920) I.L.R. 43 A. 85.

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in favour of the appellants further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience,"

do not deny the Appellate Court's jurisdiction to interfere in a proper case. Jenkins, C.J., says in *Gangadhar* v. *Banabashi*[4]:

"There is no doubt that the words of that rule are widely expressed, but they must be applied with discretion."

And later on, the learned Judge adds:

"No hard and fast rule can be laid down."

A similar opinion is expressed by Mukerjee, J., in *Abjal Majhi* v. *Intu Bepari*[5]. It would thus appear that the statement of the learned Judges in *Ramalingam Chettiar* v. *Subramania Chettiar*[6] that the two Calcutta decisions just now mentioned laid down that the exercise of the rules should be limited to cases where the Court has interfered in favour of the appellants and further interference is required to adjust the rights of parties, is not—with all deference to the learned Judges—quite accurate. There is no warrant for limiting the very wide terms of the rule only to this class of cases, though *ordinarily* it may be that it is in those cases occasions arise for exercising powers under the rule.

The decision in *Debendra Narain Sinha* v. *Narendra Narain Sinha*[10] recognises the extensive jurisdiction of the Court under R. 33 of O. 41, Civil Procedure Code. The latest decision of the Calcutta High Court in *Jogendra Kishore Roy* v. *Nasimuddin Sardar*[11] shows unmistakably the view of that Court on this matter. The facts of that case are thus summarised in the headnote:—

"In a suit for the rent of a holding the first Court passed a decree in favour of the plaintiff for a proportionate amount of the rent payable in respect of the land included in the plaint on the ground that the holding covered more lands than were included in the plaint. There was no appeal (or cross-objection) by the defendant, but on an appeal by the plaintiff the Appellate Court held that having regard to the manner in which the suit had been framed, the plaintiff would be entitled to no relief and accordingly dismissed the entire suit of the plaintiff."

The High Court held—

"that having regard to the very wide powers given to an Appellate Court under O. 41, R. 33 of the Code of Civil Procedure, the decision of the Appellate Court dismissing the whole of the plaintiff's suit, in the absence of a cross-appeal or cross-objection by the defendant, was not without jurisdiction."

4. (1914) 22 C.L.J. 390.
5. (1915) 22 C.L.J. 394.
6. (1927) I.L.R. 50 M. 614: 52 M.L.J. 612.
10. (1919) 24 C.W.N. 110.
11. (1920) 62 I.C. 623.

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The following observation appearing in the judgment gives a complete reply to the arguments urged by the appellant before us:—

"There can be no doubt that the wording of R. 33 is very general and in this respect gives very wide powers to the Court of Appeal. But the learned vakil for the appellant, however, urges in reply that R. 33 is controlled by R. 22 and that the wide powers given by R. 33 can only be exercised in case the whole matter is brought into controversy before the Appellate Court by a cross-appeal or a cross-objection filed under R. 22. I am not satisfied that this is a correct view of the scope of R. 33."

Our own Court has not dealt with this question except in the decision reported in *Ramalingam Chettiar* v. *Subramania Chettiar*[6] already referred to. In *Gopala Aiyangar* v. *Mummachi Reddiar*[12] the learned Judges, "to be consistent," gave relief to a defendant though he had not appealed or joined in the memorandum of objections filed by some of the respondents. The Privy Council in *Chockalingam Chetty* v. *Seethai Achi*[7] observes that under O. 41, R. 33, Civil Procedure Code, the Appellate Court is empowered, in a proper case, to add a defendant as respondent to the appeal for the purpose of passing a decree against him though their Lordships "saw no sufficient reason for interfering with the refusal of the Appellate Court to do so" in that instance. On the whole, we are satisfied that in a *proper case* the Lower Appellate Court has jurisdiction to exercise its powers in favour of the respondent by dismissing the plaintiff's case *in toto* though the respondent did not prefer a cross-appeal or memorandum of objections challenging the decree passed by the first Court.

As already stated whether interference was justified or not would depend upon the particular circumstances of each case. In the case before us, the Subordinate Judge came to the conclusion that at the time when the appeal was filed the law that prevailed in Madras with regard to the plaintiff's right to redeem was what was laid down in *Venkata Seetharamayya* v. *Venkataramayya*[1] and that therefore the respondent could not take exception to the District Munsif's decree by preferring an appeal or cross-appeal. But by the time the appeal came on for hearing before him, the report of a decision of this Court refusing to follow *Venkata Seetharamayya* v. *Venkataramayya*[1] appeared in *Chamiyappa Tharagan* v. *Rama*

1. (1912) I.L.R. 37 M. 418.
6. (1927) I.L.R. 50 M. 614: 52 M.L.J. 612.
7. (1927) L.R. 55 I.A. 7: I.L.R. 6 R. 29: 54 M.L.J. 88 (P.C.).
12. (1922) 17 L.W. 254 at 272.

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Aiyar[2]. Relying on this decision respondent raised the question before the Lower Appellate Court. In these circumstances the Subordinate Judge held that there was sufficient excuse or justification for the respondent not having preferred an appeal or a memorandum of objections. With this view Srinivasa Aiyangar, J., also agreed. If, therefore, the Subordinate Judge's decision that the case in *Chamiyappa Tharagan* v. *Rama Aiyar*[2] really has overruled the decision in *Venkata Seetharamayya* v. *Venkataramayya*[1] is correct, then we cannot say that he was wrong in exercising his discretion under O. 41, R. 33, and dismissing the plaintiff's suit *in toto*, though the respondent had not filed an appeal or a memorandum of cross-objections. The question for decision in this Letters Patent Appeal therefore reduces itself to this: Has the plaintiff-appellant in this case no right to redeem in view of the decision in *Chamiyappa Tharagan* v. *Rama Aiyar*[2]? As already indicated this question was decided against him both by the Lower Appellate Court and by the learned Judge whose decision is now under appeal.

The case will be posted for further hearing on this point.

Sir Murray Coutts-Trotter, C.J.—I agree.

Beasley, J.—I agree.

The Letters Patent Appeal came on for further hearing before Beasley, C.J., Anantakrishna Aiyar and Curgenven, JJ.

T. L. Venkatarama Aiyar for appellants.—An attachment confers on the creditor a right to redeem. After the decision in *Soobhul Chunder Paul* v. *Nitye Churn Bysack*[13] the legislature advisedly includes attaching creditor in S. 91 of the Transfer of Property Act. The attaching creditor ought to have been made a party to the mortgage suit.

[ANANTAKRISHNA AIYAR, J.—If he has a right to redeem, why is he not a necessary party?]

Under S. 85 of the Transfer of Property Act the attaching creditor was a necessary party. See *Ghulam Husain* v. *Dina Nath*[14] and *Venkata Seetharamayya* v. *Venkataramayya*[1]. Order 34, Rule 1, Civil Procedure Code, does not modify the law in this respect. An attaching creditor is "a person having an interest in the right of redemption" within the meaning of that section. Reference was made to *Lakhpat Rai* v. *Fakhr-ud-din*[15] and *Shananda Chandra Pal* v. *Sri Nath Ray Choudury*.[16] The right of the attaching creditor is the same as that of puisne mortgagees who

1. (1912) I.L.R. 37 M. 418.
2. (1920) I.L.R. 44 M. 232: 40 M.L.J. 65.
13. (1880) I.L.R. 6 C. 663.
14. (1901) I.L.R. 23 A. 467.
15. (1917) I.L.R. 39 A. 536.
16. (1912) 17 C.W.N. 871 at 872.

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have been held to be necessary parties. The result of non-joinder of a necessary party is stated in *Mulla Vittil Seethi* v. *Achuthan Nair*.[17] The decision in *Venkata Seetharamayya* v. *Venkataramayya*[1] gives effect to the provisions of S. 91 (*f*) while the other decisions in *Veyindramuthu Pillai* v. *Maya Nadan*[18] and *Chamiyappa Tharagan* v. *Rama Aiyar*[2] render them nugatory. Not having been made a party to the mortgage suit the attaching creditor is not bound by the sale and is entitled to redeem.

P. R. Srinivasan for respondents.—There is a distinction between the right to redeem given by S. 91, Transfer of Property Act, and the proper constitution of a mortgage suit which is governed by O. 34, R. 1, Civil Procedure Code. It is one thing to say that the attaching creditor can intervene before the sale in order to exercise his right to redeem, another thing that the suit is bad because of non-joinder. Refers to O. 1, R. 9, Civil Procedure Code.

[ANANTAKRISHNA AIYAR, J., refers to Macpherson on Mortgages at page 700.]

It is well settled that an attachment confers no interest in the property attached. Section 91 (*f*) merely confers on the attaching creditor a privilege to institute a suit for redemption. Section 91 enumerates the persons entitled to redeem. In the first two clauses persons having a legal interest, that is, an interest in the property, are enumerated. The subsequent clauses mention persons who for special reasons are given a personal right to redeem. There is a distinction between the two categories. The interest under clauses (*a*) and (*b*) is one in the property which can be created only by a registered instrument.

[ANANTAKRISHNA AIYAR, J.—The only question is whether the attaching creditor is a proper party.]

Order 34, Rule 1 makes it obligatory to implead only those persons having an interest in the mortgage property or right of redemption specified in clauses (*a*) and (*b*) of S. 91, Transfer of Property Act.

The second argument is that the right of the attaching creditor to redeem is extinguished by reason of the Court sale. If he purchases the property he loses the right to redeem *qua* attaching decree-holder but becomes entitled to redeem as owner of the mortgaged property under clause (*b*) of S. 91.

[CURGENVEN, J.—There is no difference between cases where the attaching creditor purchases the property and cases where a third party is the purchaser.]

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1. (1912) I.L.R. 37 M. 418.
2. (1920) I.L.R. 44 M. 232: 40 M.L.J. 65.
17. (1911) 21 M.L.J. 213 (F.B.).
18. (1919) I.L.R. 43 M. 696: 39 M.L.J. 456.

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In either case the judgment-debtor's interest having gone the attachment also goes. The right to redeem is conferred on the attaching creditor simply to work out his rights under the attachment and have the property sold for the best possible price. *Venkata Seetharamayya* v. *Venkataramayya*[1] is a case where the question was raised before the sale. Once the sale is held the right of redemption specially conferred on the attaching creditor is extinguished. Reference was made to *Veyindramuthu Pillai* v. *Maya Nadan*[18] and *Chamiyappa Tharagan* v. *Rama Aiyar*[2]. Further, the plaintiff having purchased the mortgaged property *pendente lite*, the proceeding in the mortgage suit will be binding on him, and his right of redemption will be extinguished by the sale in execution of the mortgage decree.

T. L. Venkatarama Aiyar replied.

The Court delivered the following

Anantakrishna Aiyar, J.

JUDGMENTS. *Anantakrishna Aiyar, J.*—This Letters Patent Appeal raised two important questions of law, one turning on the construction to be placed upon O. 41, R. 33, Civil Procedure Code, and the other on S. 91 of the Transfer of Property Act read with O. 34, R. 1, Civil Procedure Code.

The first question has been answered in favour of the respondents and against the appellant by a Full Bench of this Court at an earlier stage of this Letters Patent Appeal.

The only other question that remains for decision is whether the plaintiff, on the facts stated in the Order of Reference, is entitled to redeem the 1st defendant's mortgage. The plaintiff was a money decree-holder against the judgment-debtor, the mortgagor, and in execution of his money-decree he attached the mortgaged properties. Pending the attachment, the 1st defendant, the mortgagee, filed a suit to recover the money due upon his mortgage but he failed to make the plaintiff who was then the attaching decree-holder a party to his suit on the mortgage. In course of time the plaintiff became purchaser in Court-auction in execution of his money-decree and obtained possession. The mortgagee, the plaintiff in the other suit, also became purchaser in execution of the decree passed on the foot of his mortgage. The question that arises in the present suit is whether the plaintiff, the attaching decree-holder who subsequently became also the auction-purchaser in execution of the money-decree, has got the right to redeem the mortgage on the ground that S. 91 (*f*) of the Transfer of Property

1. (1912) I.L.R. 37 M. 418.
2. (1920) I.L.R. 44 M. 232 at 240, 241: 40 M.L.J. 65.
18. (1919) I.L.R. 43 M. 696 at 698, 710: 39 M.L.J. 456.

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Act gives him such a right to redeem since he was not made a party to the mortgage suit.

The first point that arises for consideration in this connection is as to the exact scope of the expressions appearing in S. 91 (*a*) and (*b*) of the Transfer of Property Act, namely, "a person having any interest in or charge upon the property" and "any person having any interest in or charge upon the right to redeem the property" read along with O. 34, R. 1, Civil Procedure Code, "all persons having an interest either in the mortgage security or in the right of redemption." I am clear that the cases contemplated by S. 91 (*a*) and (*b*) exhaust the class of cases contemplated by O. 34, R. 1, Civil Procedure Code, and that it is only persons interested in the mortgage security or in the equity of redemption that have necessarily to be made parties to a suit under O. 34, R. 1, Civil Procedure Code. This is the view that has been taken in *Chamiyappa Tharagan* v. *Rama Aiyar*[2] and in *Veyindramuthu Pillai* v. *Maya Nadan*[18]. It is also clear that attachment in execution of a money-decree does not itself create any interest in or charge over the properties which are the subject-matter of the attachment. This has been decided by the Privy Council in *Moti Lal* v. *Karrabuldin*[19] and is not open to question. Having regard to the construction placed on S. 91 (*a*) and (*b*) of the Transfer of Property Act, and to the view taken regarding the scope of O. 34, R. 1, Civil Procedure Code, it seems to me that it could not be said that a person in the position of the plaintiff, namely, an attaching decree-holder in execution of a money-decree against the mortgagor is a necessary party to a suit under O. 34, R. 1, Civil Procedure Code.

The question then arises whether the plaintiff, simply because under clause (*f*) of S. 91 he is given a right to redeem, as an attaching decree-holder, is entitled in the circumstances that have happened in this case to claim redemption. It has been held by Oldfield, J., in *Veyindramuthu Pillai* v. *Maya Nadan*[18] that any rights he might have *qua* attaching decree-holder are not available to him when the properties have been sold in execution through Court; and that view has been accepted by two learned Judges of this Court, Sir John Wallis, C.J., and Seshagiri Aiyar, J., in *Chamiyappa Tharagan* v. *Rama Aiyar*[2]. It was argued that, if under clause (*f*) an attaching

2. (1920) I.L.R. 44 M. 232: 40 M.L.J. 65.
18. (1919) I.L.R. 43 M. 696: 39 M.L.J. 456.
19. (1897) L.R. 24 I.A. 170: I.L.R. 25 C. 179 (F.B.).

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decree-holder has been given a right to redeem, then, whatever might be the exact category under which the right could be placed, not having been a party to the mortgagee's suit, his rights could not vanish. The answer to this is furnished in the judgment of Oldfield, J., and the other learned Judge in *Veyindramuthu Pillai* v. *Maya Nadan*[18]. The Legislature evidently saw the impropriety of retaining clause (*f*) of S. 91 after the Privy Council made it clear that an attachment as such does not create any title to, or interest or charge on, the properties attached in favour of the attaching decree-holder, and has accordingly omitted clauses (*f*) and (*g*) from the section in the Transfer of Property (Amendment) Act, 1929. The case is not consequently of any general importance and could not arise under the present law; and I am not prepared in the circumstances to reconsider the point decided by the three learned Judges of this Court in *Veyindramuthu Pillai* v. *Maya Nadan*[18] and *Chamiyappa Tharagan* v. *Rama Aiyar*[2] whose observations I have already referred to and I respectfully follow their opinion on this point. It follows that this contention raised by the learned Advocate for the appellant should fail. The Letters Patent Appeal should, for these reasons, be dismissed.

But having regard to the fact that the Lower Appellate Court exercised the rather extraordinary jurisdiction that Courts have under O. 41, R. 33, Civil Procedure Code, and granted a decree in favour of the respondents though the respondents had not preferred an appeal to it, and for that reason directed that they should have no costs of the litigation, I think that this Letters Patent Appeal should, in the circumstances, be dismissed without costs.

The Chief Justice.—I agree and have nothing further to add.

Curgenven, J.—I agree.

B.V.V. *Appeal dismissed.*

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2. (1920) I.L.R. 44 M. 232: 40 M.L.J. 65.
18. (1919) I.L.R. 43 M. 696: 39 M.L.J. 456.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE CORNISH.

V. M. Raghavalu Naidu and Son .. *Appellants** *(Plaintiffs)*

v.

The Corporation of Madras .. *Respondent* *(Defendant).*

Raghavalu Naidu *v.* Corporation of Madras.

Madras City Municipal Act (IV of 1919), *Ss.* 98, 129, *Sub-Ss.* (1) *and* (3), 349 (2) *and* (29)—*Bye-laws made under—Validity—Misquotation of authority—Effect of—Rule requiring application for refund to be made* 48 *hours before export—Abrogation of the statutory right of refund—Penalty of forfeiture—No express power to impose*—Ultra vires.

Subsidiary legislation by bye-law, if it is to be valid, must come clearly within the powers given to the body making it by their controlling statute.

A rule framed by a rule-making authority is not *ultra vires* merely because the provisions of the statute under which the authority purported to act do not in fact confer any such power, provided it had such power under some other provision of law. Misquoting their authority by oversight or mistake does not take away any power or authority conferred by law.

Rajam Chetty v. *Seshayya,* (1895) I.L.R. 18 M. 236: 5 M.L.J. 114 (F.B.) and *Secretary of State for India in Council* v. *Appa Rao,* (1923) 45 M.L.J. 156, referred to.

S. 129 (1), proviso 2 of the Madras City Municipal Act (IV of 1919) confers an unqualified right to a refund of the timber tax on the exporter when any timber in respect of which tax has been paid is exported beyond the City. Bye-law No. 8, purporting to have been made by the Corporation of Madras under S. 129 (3) and S. 349 (2) of the Act, provides that an application for refund of timber-tax should be made at least forty-eight hours before the date of the intended export. In a suit to enforce a claim for refund of the tax which was resisted by the Corporation on the ground that this bye-law had not been complied with,

Held, the bye-law in question was not authorised by either of the two sections; the former relates to seizure and sale of timber in respect of which the tax is not paid, the latter to collection of taxes. They have nothing to do with the refund of taxes. Nor is it covered by S. 129 (1) which deals with the fixing of the rates—a power different from that of regulating the refund of the tax.

But the words "and the purposes of this Act" in S. 349 (29) of the Act are wide enough to give the Corporation power to make the bye-law. That is a general and residuary provision to cover all purposes of the Act, one of which is the making of refunds of timber-tax.

That does not, however, conclude the question of its validity. The bye-law is subject to the further restriction imposed by the section itself that it should not be "inconsistent with the Act". It is perfectly reasonable, of course, to provide that the right to refund should be clearly proved or that applications for refund should be made in a certain form or at a certain time and place but a bye-law, the penalty for the breach of which amounts to a complete abrogation of the statutory right of refund, defeats the very purpose of the Act; such a rule is beyond the power of the Corporation to make.

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*O.S.A. No. 73 of 1928. 26th November, 1929.

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When a power to make regulations is given to a public body by statute, no regulations made under it can abridge (or impose unreasonable conditions on) a right conferred by the statute itself.

Queen v. *Bird,* (1898) 2 Q.B. 340, followed.

A bye-law cannot impose a penalty of forfeiture unless such a power is expressly conferred by the statute.

Kirk v. *Nowill,* (1786) 1 T.R. 119: 99 E.R. 1086, referred to.

The bye-law in question is, therefore, *ultra vires.*

On appeal from the judgment and decree, dated 30th March, 1928, and passed by the Honourable Mr. Justice Beasley (now Chief Justice) in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 356 of 1927.

Sir C. P. Ramaswami Aiyar and *V. Ramaswami Aiyar* for appellants.

Vere Mockett for respondent.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—The plaintiffs in this case are a firm of timber merchants trading in Madras. They claimed from the Corporation of Madras refunds of timber-tax on a large number of lots of timber, on which they alleged that they had paid timber-tax when importing them into Madras, and which they alleged they had afterwards exported from Madras. The Corporation, who are the defendants in this case, refused to make the refunds. The plaintiffs then sued the Corporation for the total of the refunds claimed by them. The suit was heard by the learned Chief Justice, as Mr. Justice Beasley, and he dismissed it. The plaintiffs appeal.

In their written statement the defendants maintain that the plaintiffs did not satisfy them that these lots of timber were timber on which tax had been paid when imported into Madras, and that the plaintiffs did not comply with certain bye-laws made by the Corporation, and that, therefore, they were not entitled to the refunds claimed. Under section 98 of the Madras City Municipal Act the Corporation may levy a tax on timber brought into the City. Under section 129 of that Act the tax shall be levied at such rates and in such manner as may be determined by the Council of the Corporation, provided that the rates shall not exceed Rs. 5 a ton, and provided that, when any timber in respect of which tax has been paid is exported beyond the city, nine-tenths of the tax levied thereon shall be refunded. The plaintiffs, as I have said, applied for these refunds on the ground that they had exported timber on which they had already paid tax when it was imported. The ground of refusal on the

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part of the Corporation which occupied attention at the trial of the suit and at the hearing of this appeal is that the plaintiffs did not make their application for refund 48 hours before the timber was exported, as required by a certain bye-law made by the Corporation. That bye-law is Bye-law No. 8, published in a notification with other bye-laws in the *Fort St. George Gazette* on the 27th September, 1921. It runs:

> "Such application (that is an application for refund of timber tax) shall be made at least 48 hours before the date of the intended export beyond the limits of the city and shall be accompanied by the original receipt granted on import thereof."

That last word "thereof" is a little peculiar; but we need not spend any time on that. The defendants say that they can enforce that bye-law, which according to them is a valid bye-law, by refusing to give the refund if it is not complied with. The plaintiffs contend that the bye-law, in the sense in which the defendants wish to enforce it, is beyond the power of the Corporation to make.

Now that bye-law with the other bye-laws in the notification I have mentioned purports to have been made under sections 129 (3) and 349 (2) of the Madras City Municipal Act. I think it is quite clear that that bye-law cannot have been made and could not be made under section 129 (3) of the Act, which runs:

> "The Council may make bye-laws for the seizure and sale of timber in respect of which the tax due is not paid."

Could it have been made under section 349 (2)? The learned Chief Justice is of opinion that it could be made validly under that section. With respect I feel bound to differ from him on that point. Subsidiary legislation by bye-law, if it is to be valid, must come clearly within the powers given to the body making it by their controlling statute. Section 349 (2) of the Act runs:

> "The Council may make bye-laws, not inconsistent with this Act or with any other law, to provide for the regulation of the time and mode of collecting the taxes, duties and tolls under this Act."

The learned Chief Justice says in his judgment:

> "In my view the words 'collecting the taxes, duties and tolls under this Act' must include the question of refunds of the tax so collected."

With that opinion I am unable to agree. The collection of taxes to my mind is one thing: the refund of taxes is quite another thing. In respect of many taxes which are collected there is no right in anybody to claim a refund. If the Legislature gives any subordinate body the power to impose a tax, that is a power to require some person to pay the tax. The duty in that case

is upon the tax-payer. If the Legislature gives the tax-payer the right to claim a refund in certain circumstances, then the duty is upon the other party, upon the body which collects the tax. And to give power to make bye-laws regarding the collection of taxes, the time and manner in which they are to be paid by those persons from whom they are due, appears to me an entirely different thing from giving power to make bye-laws about the conditions on which the Corporation or other body concerned is required to perform its duty of refunding the tax. I cannot find any authority in section 349 (2) empowering the Corporation to make bye-laws in regard to the refund of taxes.

Then could the Corporation make this bye-law under any other section of the Act? It has been suggested for the plaintiffs, that, as the Corporation purported to make these bye-laws under sections 129 (3) and 349 (2) of the Act, it is of no interest to us whether they could have made Bye-law No. 8 under any other section of the Act and that they must be confined to the power to which they themselves have appealed and under which they have purported to make the bye-law. On the other hand Mr. Mockett for the defendant has contended that, if a bye-law-making body quotes, when promulgating a bye-law, some provision which is inapplicable, that bye-law may yet be quite valid, provided the bye-law-making body had authority to make it under some other provision of law: misquoting their authority by oversight or mistake does not take away any authority given by law. On that question I agree with Mr. Mockett's contention. That is clearly the view which was taken by a Full Bench of this Court in *Rajam Chetty* v. *Seshayya*[1] and it is the view which was adopted and applied by Mr. Justice Krishnan in *Secretary of State for India* v. *Appa Rao.*[2] No authority to the contrary has been quoted before us.

Let us see then whether this bye-law could have been made by the Corporation under any other provision of the Act. The learned Chief Justice is of opinion that it could have been made by the Corporation under section 129 (1) of the Act. That sub-section provides:

"The tax on timber brought into the City shall be levied at such rates and in such manner as may be determined by the Council."

There again I must differ from the learned Chief Justice. I do not think that out of a power of fixing the rates at which, and the manner in which, the tax must be paid you can get

1. (1895) I.L.R. 18 M. 236: 5 M.L.J. 114 (F.B.).
2. (1923) 45 M.L.J. 156.

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a power to regulate the refund of that tax. But Mr. Mockett has urged before us, what does not appear from the record or from the learned Chief Justice's judgment to have been urged before him, that this bye-law could have been made by the Corporation under section 349 (29) of the Act. That runs:

"The Council may make bye-laws, not inconsistent with this Act or with any other law, to provide in general for securing cleanliness, safety and order and the good government and well-being of the city and for carrying out all the purposes of this Act."

Mr. Mockett contends that these words "for carrying out all the purposes of this Act" are wide enough to give the Corporation power to make this bye-law. On the other hand it is contended for the plaintiffs that we must regard the words "for carrying out all the purposes of this Act" as controlled by the earlier words in that sub-section "securing cleanliness, safety and order and the good government and well-being of the city" and it is contended that making refunds of tax would not come within these expressions. Here again I agree with Mr. Mockett's contention. I do not think this is a case in which we can apply the rule in regard to the interpretation of generic words following specific words. The words here are not "and other" or "the other" purposes of the Act. They are much wider than that. They are "for carrying out all the purposes of this Act." That appears to me to be a general and residual provision to cover all the purposes of the Act which have not been specifically mentioned in the earlier paragraphs of the section. The making of refunds of timber tax may be legitimately said, I think, to be one of the purposes embraced in the Act.

But does it follow that the Corporation can make such a bye-law as they have made in this case regarding refunds of timber tax? I agree with Mr. Mockett's contention that, even if there is—and I think there clearly is—a duty imposed by section 129 on the Corporation to make these refunds, we need not read the Act in so unreasonable a way as to suppose that it is the duty of the Corporation officials to run round the town to find exporters of timber and thrust refunds upon them. The reasonable way of interpreting the provision regarding refunds is that the Corporation must pay refunds when properly applied for by those who are entitled to them. I think we may go further and agree with Mr. Mockett that the Corporation may reasonably require exporters who claim refunds to show to their satisfaction that refunds are due to them. Indeed I did not understand that this was seriously contested by the other side. It would be perfectly reasonable in my opinion for the Corpo-

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ration to issue a notification inviting exporters who claim refunds to apply at a certain office or in a certain form or at a certain time, provided the invitation and its details were reasonable. If an exporter claiming refund did not comply with those details, I think the Corporation might well do nothing in the matter and leave it to the exporter to sue them, if he thought fit; and in such a case it is probable that, if the exporter's conduct had been unreasonable in not applying in the way he was invited to do or not giving proper information to the Corporation officials, he would lose his costs and he might perhaps have to pay the Corporation's costs, even if he succeeded in getting his refund decreed. But all that is a very different thing from making a bye-law such as has been made in this case. A bye-law, as Lord Russell said in *Kruse* v. *Johnson*[3], is:

"An ordinance . . . . . imposed by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance."

Now here we have a duty imposed by the Act on the Corporation to make refunds of nine-tenths of the tax paid on timber, if it is exported from the City. Can the Corporation make a bye-law, enforced by a penalty, compelling the person who has the corresponding right of demanding the performance of that duty to apply for it in a particular way or at a particular time? If we look at the penalty ostensibly imposed in this group of bye-laws, we find that under Bye-law 14 any person offending against any of these bye-laws shall be punishable with a fine which may extend to fifty rupees. To apply that to Bye-law 8 appears to me on the face of it absurd, and Mr. Mockett has agreed that that penalty cannot really be applicable to Bye-law 8. Here we have an exporter, who has a right to claim a refund under the Act, and this Bye-law 14 imposes upon him a penalty up to Rs. 50 if he does not apply at a particular time. Supposing he does not think it worth while to apply at all, how can the Corporation have the power to impose a penalty in that way? Realising that that would be absurd, the Corporation has not attempted to impose that penalty on the breach of this Bye-law 8. What they claim to do is to enforce another penalty, namely, if the application is not made 48 hours before the time of export, to penalise the exporter by not giving him the refund at all. It is worth noticing that the power to impose penalties for infringing bye-laws is given under section 351 of the Act, and that only provides for penalties of fine. Then where does the Corporation get this power to impose an

3. (1898) 2 Q.B.D. 91.

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entirely different penalty, the loss of the refund? To my mind, if the Corporation could make a bye-law ordering the applicant for a refund to make his application in a certain way or at a certain time, they could not impose this particular penalty, that, if he did not comply with that bye-law, he should lose his right to the refund altogether. And I may go further and say that in my opinion the Corporation has no power in this matter, in which they have a duty to perform and the exporter has a right to claim, to promulgate any bye-law, enforceable by a penalty, compelling an exporter to do some particular thing.

That would, I think, be enough for the disposal of this appeal. But several other matters have been discussed at length before us, and I shall just say a few words about them. The learned Chief Justice was of opinion that at any rate this Bye-law 8 was a reasonable bye-law, that there was nothing unreasonable in requiring an exporter to give 48 hours' notice of his export, if he wanted to get a refund. With that view I am unable to agree. I think it can easily be shown that quite apart from any question of the power of the Corporation to make this bye-law, as it stands, without qualification, without provision for exceptional circumstances, it would be an unreasonable bye-law. Suppose that a Government Engineer or a private person sends an order to Madras to-day from some place a few miles outside the City for the urgent supply of some timber required to prevent the collapse of a bridge or a factory. If this bye-law stands good, no one from Madras could send out timber either to-day or to-morrow, however urgently it might be required (other than timber grown in Madras, of which we all know there is comparatively little) except on pain of losing all right to the refund of nine-tenths of the tax, to which he is entitled under the Act. That appears to me to show that we cannot say that this bye-law, as it stands, without qualification and without provision for exceptional circumstances, is even a reasonable bye-law.

But, reasonable or not in itself, if it is enforced, does it not obviously curtail the right of the exporter to get his refund? In effect the Corporation say by this bye-law:

> "Though we are bound to give the refund of this tax by the Act, we will not do so in certain circumstances, that is, unless you give us 48 hours' notice before export."

Mr. Mockett has contended that the bye-law, in that sense, can be regarded as carrying out the purposes of the Act. To my mind it could more properly be described as defeating, or

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at any rate restricting, the purposes of the Act in respect of refunds.

A large number of cases have been quoted before us; but I do not think it necessary now to refer to more than one or two of them. In *Queen* v. *Pawlett*[4] there was a right of appeal to the Quarter Sessions, given by the statute. The Court of Quarter Sessions added by a rule of practice an additional condition that such an appeal must be entered so many days before the Sessions began. That additional condition, though regarded by the Divisional Court as very convenient, was held to be invalid. A still more instructive case is that of *Queen* v. *Bird*[5]. Mr. Mockett suggested that that case was not applicable here. To my mind it is both very instructive and applicable. By the Licensing Act of 1872 a provisional licence granted by the Lincensing Justices had to be confirmed by the County Licensing Committee, before whom a person who had opposed the licence before the Lincensing Justices might appear and oppose its confirmation; and under the Act the Justices in Quarter Sessions had to make regulations for the meetings of the Committee and the transaction of its business and proceedings. The Justices in Quarter Sessions for the County of London made rules that any one intending to oppose the confirmation of a provisional licence must give notice within seven days after the grant of the provisional licence and must enter into recognizances in the sum of £20. The Divisional Court held that, though the rule about notice was reasonable and proper in itself, the rules were *ultra vires*, because they imposed fresh conditions on the objector's right to oppose the confirmation, which had been given to him by the Act. Mr. Justice Wills declared it—

"a principle too clear to need the support of authority that, when a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself."

Is not that what the Corporation has attempted to do in this case? The exporter has a right to claim this refund, if he exports timber. The Corporation has in effect attempted to abridge that right by saying that it shall not have effect unless a further condition is fulfilled, unless the application is made 48 hours before the export. The learned Chief Justice at the close of his judgment said that in his opinion the effect of this bye-law is only this: "Prove to our satisfaction that it is the same timber and you will get a refund." With respect, in my opinion,

4. (1873) L.R. 8 Q.B. 491.
5. (1898) 2 Q.B. 340.

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that is a serious under-statement of the effect of this bye-law, as the defendants contend they are entitled to enforce it. Surely it would be more correct to say that what the defendants maintain is the effect of this bye-law is:—

"Pove to us by giving us notice 48 hours before you export the timber that it is the same timber on which you have paid tax: otherwise we will not make the refund."

In my opinion this bye-law, in the sense in which the defendants maintain they have a right to enforce it, is entirely beyond the power of the Corporation to make.

There was another aspect of the case which was put before us, namely, that the Act gives the exporter a certain right to nine-tenths of the tax which he has paid and that, if the Corporation take away that right to the nine-tenths, as they claim they may do in certain circumstances, they are working a forfeiture of the exporter's right. On that point *Kirk* v. *Nowill and Butler*[6] was quoted before us, in which Lord Mansfield said that a bye-law could not impose a penalty of forfeiture unless the power to make it was expressly given, and Mr. Justice Buller said that the invalidity of a bye-law to that effect was made more clear by the fact that the power to impose a penalty by fine was expressly given in that case. That case also is interesting in connection with the present case and shows that there is another defect in this bye-law. But I do not think in the circumstances it is necessary to discuss that any further.

I may add that the defendants raised a plea of limitation; but, so far as the record goes, nothing appears to have been said about that at the trial, and nothing has been said about it before us.

In my opinion this appeal must be allowed. The result of that is that the plaintiffs' claim to these refunds has still to be disposed of. The learned Chief Justice said that, if he had agreed with the plaintiffs that this bye-law was beyond the power of the Corporation to make, he would have referred the case to the Official Referee in order that he might report on which of these lots of timber import tax had been paid, as that was disputed by the defendants and had not yet been made out by the plaintiffs. Mr. Mockett suggested that the proper course would be rather to send the case back to the Corporation in order that they might now satisfy themselves whether the tax had been paid on these lots of timber. Now that the case has come before the Court, I think that cannot be done. The question what is due to the plaintiffs must be decided by the

6. (1786) 1 T.R. 118: 99 E.R. 1006.

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Court. And, if the case is not to go back to the Corporation, the defendants, I understand, do not object to its being referred to the Official Referee, to which the plaintiffs also agree. But, before that is done, it has been suggested before us that the parties should be given an opportunity to see whether they cannot agree that import tax was paid on all or any of these lots of timber. It appears to me very reasonable that they should be given an opportunity to do that, and in my opinion the most convenient course will be to make an order that this matter should be referred to the Official Referee, as the learned Chief Justice suggested, for a report by him which of these lots of timber have been actually exported and on which of them import tax was paid, but with the qualification that the matter will be adjourned for a month in order that the parties may have an opportunity of seeing whether they cannot agree in respect to all or some of the items on this part of the case. For the purpose of the proposed settlement documents produced by either party may be delivered to them out of Court on application.

In regard to costs the proper order in my opinion will be that the defendants shall pay the plaintiffs the costs of this appeal. Costs in the suit will remain to be dealt with when the final hearing of the suit is completed. The case should now go back to the Original Side for further proceedings.

Cornish, J.

Cornish, J.—I agree. In my opinion the Corporation bye-laws, even assuming they are *intra vires,* do not justify what the Corporation has done. There is no rule in the bye-laws which in terms empowers the Corporation to penalise an applicant by refusing a refund of tax because he has not complied with the bye-laws. Rule 8 on which the Corporation relies simply says this:

"Such application (that is, an application for refund) shall be made at least 48 hours before the date of the intended export beyond the limits of the city, and shall be accompanied by the original receipt granted on import thereof."

Neither this rule nor any other rule says that, on non-compliance with these requirements, the applicant is liable to forfeit the refund. The only penalty fixed by the bye-laws for a breach of them is that contained in R. 14, namely, liability to a fine of Rs. 50 on conviction. If, therefore, it is an offence against the bye-laws not to give the Corporation at least 48 hours' notice of an intended export of timber as a condition to an application for refund, the utmost penalty to which the offender is exposed by the bye-laws is a fine of Rs. 50. The bye-

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laws do not empower the Corporation to penalise him further by forfeiting his right to get a refund; and the Act confers no such power.

But apparently R. 8 is intended to mean a good deal more than what it says, and the Corporation claims that it is entitled by this rule to refuse a refund of the tax if the application for refund is not made within the prescribed time. That is the claim asserted in paragraph 5 of the written statement. Whether this is a valid claim depends upon whether the bye-law is valid. I do not think that the bye-law in question has any relation to section 129 (3) which confers the power to make bye-laws for the seizure and sale of timber which has been imported without paying the tax. Nor do I think it necessary to decide whether the power given by section 349 (2) to make bye-laws "for regulating the time and mode of collecting the taxes" is wide enough to include a power to make bye-laws for regulating the time and mode of refund. In my view, section 349 (29), with its power to make bye-laws "in general for carrying out all the purposes of the Act," is comprehensive enough to include the power to make regulations governing the refund of tax. But all bye-laws made under section 349 are subject to the restriction imposed by the section itself, that "the council may make bye-laws not inconsistent with the Act or with any other law."

Now, section 129 (1), second proviso, definitely enacts that when any timber in respect of which tax has been paid is exported beyond the city, nine-tenths of the tax shall be refunded. An unqualified right to a refund is given by the Act. But no one could suppose that a refund of the tax is to be had from the Corporation simply for the asking. The Corporation has obviously the right to require that it shall be satisfied by proper evidence that a refund can be claimed. It is only right and reasonable, therefore, that the Corporation should have the power to make bye-laws for regulating the procedure to be followed in applications for a refund of tax; and, as I have said, I think section 349 (29) gives the Corporation power to make bye-laws for this purpose. But a bye-law which professes to take away or abridge the right to a refund given by section 129 would be clearly inconsistent with the Act; and if it is inconsistent, it is *ultra vires*. The authorities which have been referred to by my learned brother leave no doubt on that point. I will only supplement those authorities with a reference to a

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passage from the judgment of Shephard, J., in *Rajam Chetti* v. *Seshayya*[1]:

"Now it is a recognised principle of law that the rules made in pursuance of a delegated authority to that effect must be consistent with the Statute under which they came to be made. The authority is given to the end that the provisions of the Statute may be the better carried into effect, and not with the view of neutralising or contradicting those provisions."

Rule 8 of the Corporation bye-laws undoubtedly does neutralise and contradict the right to refund given by section 129 (1), because, as interpreted by the Corporation, it means that the Corporation can refuse to allow an applicant to prove his right to a refund, unless he has given with his application 48 hours' notice of the intended export of timber; and for that reason, in my opinion, this rule is *ultra vires*.

I agree with my learned brother in the proposal to refer the matter to the Official Referee.

Attorney for respondent: *S. Rajamanikkam.*

S.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD TOMLIN, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

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Rai Saheb Moti Lal Manucha *v.* The Unao Commercial Bank, Ltd., Cawnpore.

Rai Saheb Moti Lal Manucha .. *Appellant**

v.

The Unao Commercial Bank, Ltd., Cawnpore .. *Respondents.*

Indian Contract Act (IX of 1872), S. 251—Mercantile firm—Authority of partner to draw and accept bills and hundis—Hundis taken in renewal—Right to sue on original hundis.

In a mercantile trading firm a partner has implied authority to draw and accept bills of exchange or hundis on behalf of the firm.

Bunarsee Dass v. *Gholam Hossein*, (1870) 13 M. I. A. 358, followed.

Where the implied authority of the partner to accept hundis has been expressly cancelled, the firm will nevertheless be liable on the hundis to a holder in due course, unless it is established that he had knowledge of such cancellation.

Quaere, whether the *munib* of a mercantile trading firm has, by custom or otherwise, authority to accept hundis on the firm's behalf.

Where a hundi is drawn by way of renewal of and in substitution for a previously accepted hundi, the substitution is conditional on the substituted hundi being accepted by the drawee. Where it is not so accepted and the condition is, therefore, unfulfilled, the original accepted hundi remains in full force as against the acceptor, and he is liable to be sued upon it.

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*P.C. Appeal No. 93 of 1928. 20th June, 1930.
Allahabad Appeals Nos. 2, 3, 4 and 5 of 1927.

1. (1895) I.L.R. 18 M. 236 at 245: 5 M.L.J. 114 (F.B.).

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Consolidated Appeals No. 93 of 1928 from four decrees of the High Court, Allahabad, dated the 19th October, 1926. Three of the said decrees affirmed three decrees of the Subordinate Judge of Cawnpore, dated the 21st September, 1923, whilst one decree reversed a decree of the Subordinate Judge of Cawnpore, dated the 21st September, 1923, with the result that the four suits which had been instituted by the plaintiffs-respondents were decreed with costs.

The facts appear sufficiently fully from their Lordships' judgment.

The plaintiffs' case was shortly that two Cawnpore firms drew hundis on the Calcutta firm which were discounted by the plaintiffs and accepted by the Calcutta firm through the medium of their *munib*, Shambu Ratan, and subsequently dishonoured. In Suit No. 187 it was further stated that when hundis Nos. 7 and 8 were not paid on due presentation, defendants Nos. 1 and 2 asked for a renewal of the hundis for sixty-one days, which the plaintiff Bank accepted on condition that 3rd defendant (the drawee), Moti Lal Bisheshar Nath, accepted such renewed hundis; that according to this arrangement 1st defendant drew hundis Nos. 9 and 10 in lieu of the unpaid hundis, but these hundis being presented at Calcutta for acceptance the drawees refused to accept them; that the renewal of the hundis was granted on the express understanding that the same would be accepted by the drawees, but as they did not accept them the former hundis remained subsisting and enforceable.

The defendant-appellant pleaded that he was not liable because--

1. The drawings by the Cawnpore firms and the acceptances of Shambu Ratan were part of a conspiracy between Bisheshar Nath, Shambu Ratan and others.

2. That Shambu Ratan had no authority to write the acceptances.

3. That as to the hundis Nos. 7 and 8 the causes of action upon them had gone because hundis Nos. 9 and 10 had been taken in their place by the plaintiff-bank.

As to the first point mentioned above, the Trial Judge held that the drawings and acceptances were made and written as part of a conspiracy, but that the Banks were not parties to the conspiracy. The High Court on appeal held that there was no evidence to presume any knowledge of any of the officials of the Bank of this conspiracy.

As to the second question, the Trial Judge held that the bills were accepted by Shambu Ratan when presented for acceptance at the defendant-appellant's firm at Calcutta; that Shambu Ratan had no written authority to accept bills in the name of the Calcutta

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firm, but that by reason of the custom or local usage of Calcutta under which a *munib* transacting business in a firm such as the Calcutta firm can accept hundis although there is no written authority or duly executed power-of-attorney in his favour, he had ostensible authority to do so, and that there was no limitation of such implied authority given or known to the plaintiff-banks. The High Court in appeal agreed with the Subordinate Judge that Shambu Ratan had accepted the bills, and according to the usual commercial custom and practice, Shambu Ratan had authority to accept the hundis. They also held that under section 27 of the Negotiable Instruments Act, 1881, an agent's authority to accept bills need not be in writing, and that the authority given to Shambu Ratan was proved, and sufficient to bind the defendant-appellant's firm.

As to the third point mentioned above, the learned Trial Judge held that the contention of the defendant-appellant was good in law, and he, therefore, dismissed the suit of the plaintiff-Bank in reference to hundis Nos. 7 and 8. The High Court, on appeal, took the contrary view. After referring to the judgment of the Judicial Committee in *Torrance* v. *Bank of British North America*[1] the learned Judges held that the taking of bills Nos. 9 and 10 was only a conditional extinguishment of the rights of action on bills Nos. 7 and 8, and that as bills Nos. 9 and 10 were never accepted by the Calcutta firm, and were never paid, the right of action on bills Nos. 7 and 8 still enured for the benefit of the holders.

From these decrees of the High Court, the defendant, Moti Lal, appealed to His Majesty in Council.

De Gruyther, K.C. and *Dube* for appellant.

Dunne, K.C. and *Wallach* for respondents.

During the argument, reference was made to *Bank of Australasia* v. *Breillat*[2], *Bunarsee Dass* v. *Gholam Hossein*[3], *Torrance* v. *Bank of British North America*[1], *Nicholson* v. *Rickett*[4], Indian Contract Act, 1872, sections 187, 188, 237, 238, 249, 251 and Negotiable Instruments Act, 1881, sections 1 and 27.

Counsel for the respondents were not called upon.

20th June, 1930. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—Certain Cawnpore firms, in all or some of which Bisheshar Nath was a partner, drew during the years 1921 and 1922 a series of ten hundis upon a Calcutta firm of

1. (1873) L.R. 5 P.C. 246.
2. (1874) 6 Moor. P.C.C. 152: 13 E.R. 642.
3. (1870) 13 M.I.A. 358.
4. (1860) 2 El. & El. 497: 121 E.R. 187.

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Motilal Bisheshar Nath. The partners in the firm of Motilal Bisheshar Nath were the appellant and Bisheshar Nath.

Of the 10 hundis, 8 were accepted in the name of Motilal Bisheshar Nath, by the *munib** of the firm. The remaining two hundis were drawn by way of renewal of and in substitution for two of the eight accepted hundis, but were never accepted.

The eight hundis were discounted by one or other of the respondent banks, and all the hundis were dishonoured at maturity.

The banks in four suits sued Motilal Bisheshar Nath, and others on the hundis. All four suits were heard together.

Three of the suits related to the six accepted hundis in respect of which there were no renewal hundis given. On the 21st September, 1923, the Subordinate Judge at Cawnpore made decrees in these three suits for payment by Motilal Bisheshar Nath of the amounts of the six hundis. These decrees were affirmed by the High Court of Judicature at Allahabad on the 19th October, 1926.

The fourth suit related to the remaining two accepted hundis and the two unaccepted hundis intended to be substituted for them. This suit was dismissed on the 21st September, 1923, by the Subordinate Judge, as against Motilal Bisheshar Nath, on the ground that there was no acceptance by Motilal Bisheshar Nath of the substituted hundis, and that the plaintiffs' right to sue Motilal Bisheshar Nath on the original hundis had been lost by the taking of the substituted hundis.

On appeal in the fourth suit, the High Court held that Motilal Bisheshar Nath was liable on the two original hundis.

Motilal has appealed to His Majesty in Council against the decisions of the High Court in all four suits.

Both Courts below held that all the hundis were drawn pursuant to a conspiracy to which the drawing firms, Bisheshar Nath, and the *munib* of Motilal Bisheshar Nath were parties, having for its object the raising of money from the discounting banks in fraud of Motilal.

It is admitted that no consideration passed to the firm of Motilal Bisheshar Nath for accepting the hundis, and the Subordinate Judge held that the discounting banks had no notice of this fact or of the conspiracy. This finding was concurred in by the High Court.

The firm of Motilal Bisheshar Nath was a mercantile trading firm. The Subordinate Judge held that the *munib* of

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such a firm has, by custom, authority to accept hundis on the firm's behalf. The High Court held that the *munib* was authorised, in fact, by Bisheshar Nath to accept the particular hundis in question as it was essential for the carrying out of the conspiracy that they should be so accepted.

The implied authority of a partner in a mercantile firm to draw and accept bills on behalf of the firm is well recognised. In the judgment of this Board, in *Bunarsee Dass* v. *Gholam Hossein*,[3] the principles affecting the matter were stated at p. 363. in the following terms:—

"The proposition of law applicable to these facts is well known and indisputable. Every one of the partners in a mercantile firm of ordinary trading partnership is liable upon a bill drawn by a partner in the recognised trading name of the firm, for a transaction incident to the business of the firm, although his name do not appear upon the face of the instrument, and although he be a sleeping and secret partner.

"In order to take a case out of these principles of the general law, it must be shown that the holder of the bill knew at the time he received it that the transaction was the private affair of a single partner."

In their Lordships' opinion the finding of the High Court that Bisheshar Nath in fact authorised the *munib* to accept the eight hundis in question was correct, and even if (which was not established) the implied authority of Bisheshar Nath to accept hundis had been expressly cancelled by Motilal, no attempt was made to prove that such cancellation was brought to the knowledge of the discounting banks. In these circumstances, their Lordships think that the discounting banks were entitled to recover against Motilal Bisheshar Nath upon the accepted hundis, subject in the case of two of those hundis to the question next to be considered as to the effect of the substitution therefor of the two unaccepted hundis.

In their Lordships' judgment the High Court arrived at a right conclusion in holding that Motilal Bisheshar Nath was liable on the two accepted hundis for which unaccepted hundis were substituted. The substitution was conditional on the substituted hundis being accepted by Motilal Bisheshar Nath. They never were so accepted. The condition was, therefore, unfulfilled and the original hundis remained in full force as against Motilal Bisheshar Nath.

In the result, therefore, their Lordships are of opinion that these appeals fail and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman, Walker & Shephard.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeals dismissed.*

3. (1870) 13 M.I.A. 358.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD THANKERTON, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Narayanaswami Aiyar and others .. *Appellants**

v.

Rama Aiyar and others .. *Respondents.*

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Narayana-swami Aiyar *v.* Rama Aiyar.

Hindu Law—Widow—Surrender in favour of daughter's sons—No evidence of consent of daughters—Validity.

The principle applicable to the power of surrender by a Hindu widow is well settled. She can renounce in favour of the nearest reversioner if there be only one, or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death. In other words, she can accelerate the estate of the heir by conveying absolutely and destroying her life-estate.

Rangasami Gounden v. *Nachiappa Gounden,* (1918) L.R. 46 I.A. 72: I.L.R. 42 M. 523: 36 M.L.J. 493 (P.C.) and *Behari Lal* v. *Madho Lal,* (1891) L.R. 19 I.A. 30: I.L.R. 19 C. 236 (P.C.), relied on.

A Hindu widow executed four deeds by which she purported to dispose of the whole of her deceased husband's property in favour of her daughters' sons, the daughters being then alive.

Held, that the transaction did not amount to a valid surrender under the Hindu Law, as the widow did not renounce her interest in favour of the nearest reversioners, who were her two daughters and who took no interest in the properties under the said deeds.

Quaere, whether the surrender by the widow would have been valid if the daughters had in fact consented to and acquiesced in the transaction carried out by the aforesaid deeds.

Appeal No. 1 of 1928 from a decree, dated the 15th October, 1925, of the High Court, Madras, which reversed a judgment and decree, dated the 30th September, 1921, of the Subordinate Judge of Mayavaram.

The material facts of the case, for purposes of the present report, are sufficiently set out in their Lordships' judgment.

The judgment of the High Court is reported in *Rama Aiyar* v. *Narayanaswami Aiyar*[1]. In dealing with the question of surrender by the widow, Mr. Justice Ramesam (Reilly, J., concurring), of the High Court, observed as follows at page 319:—

"The requirements of a surrender are now well established by various decisions of the Privy Council. The leading case is *Behari Lal* v. *Madho Lal*[2]. In *Rangasami Gounden* v. *Nachiappa Gounden*[3] Lord Dunedin describes it as an effacement which opens the estate of the deceased husband to his next heirs at that date. In the present case, as the intermediate heirs consist of not only the widow but also the daughters, in order to effectuate a surrender in favour of daughters' sons there must be an effacement

*P.C. Appeal No. 1 of 1928. 19th June, 1930.

1. (1925) 51 M.L.J. 313.

2. (1891) L.R. 19 I.A. 30: I.L.R. 19 C. 236 (P.C.).

3. (1918) L.R. 46 I.A. 72: I.L.R. 42 M. 523: 36 M.L.J. 493 (P.C.).

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of the widow and the daughters. The renunciation must be of all the properties."

De Gruyther, K.C. and *Narasimham* for appellants.

Dube for respondents.

De Gruyther, K.C., for appellants.—A surrender by the widow, with the consent of the daughters, is valid.

[SIR GEORGE LOWNDES.—It is well established that a widow can surrender in favour of the next reversioner, but can she surrender to a person who is not then the next reversioner?]

[LORD THANKERTON.—The surrender must be to the immediate next reversioner.]

Refers to *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*[4] and *Rangasami Gounden* v. *Nachiappa Gounden*[3]. The Board there affirmed the doctrine that even if the conveyance be in favour of a third party, it would operate as a valid surrender, if it was of the whole estate and was made with the consent of the nearest reversioners.

The surrender need not be definitely to the next heir if that next heir agrees to be passed over: *Mulugu Kotayya* v. *Mudigonda Chandramowli Sastri*[5].

The form of the transaction is quite immaterial: *Bhagwat Koer* v. *Dhanukhdhari Prashad*[6].

The surrender here was *bona fide* and not a mere device to divide the estate with the reversioners: *Sureshwar Misser* v. *Maheshrani Misrain*[7].

[LORD THANKERTON.—You must show that in substance there was a surrender in favour of the daughters, although in form in favour of their sons. Lord Dunedin's judgment is quite explicit. It must be "with the consent of the nearest heirs for the time being."]

If the daughters consent, the transaction is valid: *Chinnaswami Pillai* v. *Appaswami Pillai*[8], per Sadasiva Aiyar, J., and *Protap Chunder Roy* v. *Sreemutty Joy Monee Debi Chowdhrain*[9].

[LORD THANKERTON, after referring to *Chinnaswami Pillai* v. *Appaswami Pillai*[8] said: "It is obvious therefore that

3. (1918) L.R. 46 I.A. 72: I.L.R. 42 M. 523: 36 M.L.J. 493 (P.C.).
4. (1884) I.L.R. 10 C. 1102 (F.B.).
5. (1916) 31 M.L.J. 406.
6. (1919) L.R. 46 I.A. 259: I.L.R. 47 C. 466: 37 M.L.J. 513 (P.C.).
7. (1920) L.R. 47 I.A. 233: I.L.R. 48 C. 100: 39 M.L.J. 161 (P.C.).
8. (1918) I.L.R. 42 M. 25 at 27: 35 M.L.J. 512.
9. (1864) 1 W.R. 98.

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if the daughters did not consent, it would not be a valid surrender at all".]

[SIR GEORGE LOWNDES.—The authority of the Full Bench judgment in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*[4] is somewhat impaired by subsequent decisions.]

[LORD THANKERTON.—The widow could surrender only either to all the nearest reversioners, or with the consent of all the nearest reversioners. The documents here do not on the face of them show consent of all the nearest heirs.]

The daughters' subsequent conduct, and their presence at the time must be taken to show that they consented at the time, *i.e.*, it is proof as to their original consent.

[SIR GEORGE LOWNDES refers to Mayne's Hindu Law, para. 639, as to the requisites of knowledge by the consenting party.]

Counsel for the respondents was not called upon.

19th June, 1930. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by the defendants (Nos. 1 to 8 and 10 in the suit) from a decree, dated the 15th October, 1925, and two judgments, dated the 15th August, 1924 and the 15th October, 1925, of the High Court of Judicature at Madras, reversing a decree, dated the 30th September, 1921, made by the Subordinate Judge of Mayavaram. The first four respondents are plaintiffs in the suit and the remainder of the respondents are *pro forma* defendants.

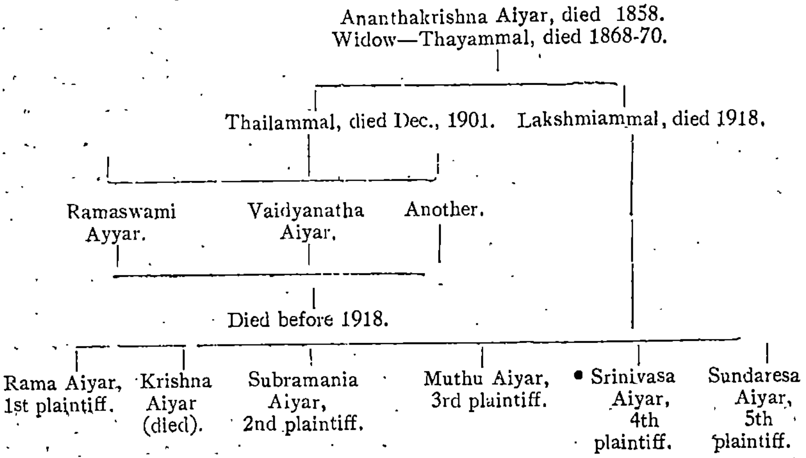
The suit was brought by five surviving sons of one Lakshmiammal. Since the institution of the suit one of the sons, Subramania Aiyar, died; the third and fourth plaintiffs are his legal representatives.

The two questions in this appeal are whether a transaction entered into by Thayammal, the widow of one Ananthakrishna Aiyar, in the year 1867, constituted a valid "surrender" under the Hindu Law, and if not, what would be the proper compensation payable to the defendants 1, 3 and 4 in respect of a building which had been erected by the vendees on part of the land.

The suit was brought by the plaintiffs as reversioners of Ananthakrishna Aiyar for possession of his properties after the death of the last intermediate female in 1918. The material facts are as follows:—

4. (1884) I.L.R. 10 C. 1102 (F.B.).

Ananthakrishna Aiyar died in 1858 leaving a widow Thayammal and two daughters Thailammal and Lakshmiammal. The widow died about 1868-70. Her first daughter died in December, 1901. She had three sons, all of whom died before 1918 leaving no issue. The second daughter died in 1918 leaving the five plaintiffs surviving her. They are, therefore, reversioners to the estate of Ananthakrishna Aiyar and are *prima facie* entitled to his properties. The following pedigree shows the relationship of the parties:—



The facts on which the defendants resist the suit are as follows:—On the 22nd July, 1867, the widow Thayammal executed four documents (Exs. III, IV, V and VI). By Ex. III she purported to sell her house to her eldest grandson, Ramaswami Aiyar, for Rs. 400. The object of this sale was ostensibly to pay off Rs. 300 promised to Lakshmiammal at the time of her marriage and Rs. 100 similarly to Thailammal. By Ex. V she conveyed lands in Radhanallur worth Rs. 380 and movables of the value of Rs. 20 to the same Ramaswami Aiyar in consideration of his having performed the funeral ceremonies of Ananthakrishna Aiyar and of his undertaking to perform her funeral ceremonies. In Anaithandavapuram she had ½ *pangu* of lands. She gave away ¼ *pangu* to Ramaswami Aiyar by Ex. VI, and the other ¼ *pangu* to Rama Aiyar (the eldest son of the second daughter) by Ex. IV. The defendants contend that these documents amount to a surrender by Thayammal accelerating the reversion: that they also amount to *bona fide* family settlement and that no reversion devolved on the plaintiffs in 1918.

By two deeds of sale, dated the 19th July, 1884, Ramaswami Aiyar and his brother Vaidyanatha sold the house and

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lands in Anaithandavapuram to one Muthu Aiyar, the father of the defendants 1 and 2, and the lands in Radhanallur were sold to Ramaswami Aiyar Avargal, the father of the 7th defendant.

From that time, the vendees and their representatives were in peaceful possession and enjoyment of the house and the land in Anaithandavapuram village, while the plaintiffs-respondents were in possession and enjoyment of their share of the lands in accordance with the documents of 1867. The vendees demolished the old dilapidated house and erected a new and substantial building on its site.

On the 22nd December, 1901, Thailammal died. Lakshmiammal then instituted Original Suit No. 12 of 1902 on the file of the Kumbakonam Subordinate Judge's Court for the recovery of the house and the land from the vendees of Ramaswami (her sister's son). Lakshmiammal's sons (except Rama Aiyar, the eldest son) also brought an action for a declaration that the alienation in favour of the appellants was not binding on them after the death of their mother, Lakshmiammal. The said two suits were tried together and the evidence for both suits was by consent recorded in the first suit. On the 9th December, 1903, the mother's suit was withdrawn unconditionally. The sons' suit was eventually dismissed on the ground of limitation, and the dismissal was affirmed by the High Court on appeal.

Lakshmiammal died on the 14th January, 1918, and on the 27th July the plaintiff-respondents and their deceased brother brought the present suit to recover possession of the lands mentioned in the plaint, of which the defendants were in possession, with other incidental relief. The learned Subordinate Judge dismissed the suit. The plaintiffs appealed to the High Court, which allowed the appeal and directed the learned Subordinate Judge to submit findings on certain issues which had not theretofore been decided.

On the further hearing of the appeal, and on consideration of the findings as to the said issues, the High Court decided that the vendee under the deed executed by Ramaswami Aiyar and Vaidyanatha, and dated the 19th July, 1884, who was the father of the first defendant, *bona fide* believed that he was the owner of the property in 1898 when he executed an improvement in the building of the value of Rs. 4,000: that an improvement made in 1903 was on a different footing, inasmuch as the suits for the recovery of the property by Thayammal's daughter and grandsons had been filed and were then

pending, and that the further expenditure of Rs. 1,500 was made before the suits were disposed of. The learned Judges held that it had not been shown that at that time the vendee *bona fide* believed that he was the owner of the property: they therefore decided that as regards the last-mentioned sum, the defendants were not entitled to compensation.

After estimating the increase in value since the improvements were made, the High Court fixed the compensation payable by the plaintiffs 1, 3, 4 and 5 to the defendants 1, 3 and 4 at the sum of Rs. 5,800.

The High Court accordingly made a decree directing that the plaintiffs should be put in possession of the properties mentioned in the plaint, and declaring that the defendants 1, 3 and 4 were entitled to compensation in the sum of Rs. 5,800 for the value of improvements effected in 1898, and that the plaintiffs 1, 3, 4 and 5 should either pay the said sum within the time to be fixed by the Lower Court and take the land and building, or sell the land to the defendants 1, 3 and 4 for the sum of Rs. 1,500, which was the agreed value of the land. A further order was made as to the removal of materials used in the improvement made in 1903 upon the terms and conditions therein contained.

The learned Judges of the High Court decided that there was no valid surrender by Thayammal, the widow of Ananthakrishna, on several grounds. They regarded it as an insuperable objection that the alleged renunciation in 1867 by the widow was not in favour of all the then reversioners: that there was a transfer of one set of properties to one group of reversioners (at the best), and of another set to another group, and that it was necessary to introduce a fictitious partition to read the transactions as a surrender: that there could not be a surrender in shares of three-fifths and two-fifths, and that apparently certain minors were unrepresented. Their Lordships do not think it necessary to express any opinion on any of the above-mentioned points, inasmuch as, in their opinion, the appeal should be disposed of upon another ground mentioned by the learned Judges.

The learned Judges of the High Court decided that there was not sufficient evidence to justify them in holding that the daughters Thailammal and Lakshmiammal surrendered their interests. Their Lordships are in agreement with the High Court's decision in respect of this matter.

It was argued, however, that the learned Judges had not considered the proper question, viz., whether the above-men-

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tioned daughters had in fact consented to and acquiesced in the execution of the four deeds by their mother Thayammal in July, 1867.

Their Lordships have examined the evidence relating to this question, and they are satisfied that it falls far short of proving the alleged consent and acquiescence on the part of the two daughters.

There is not sufficient evidence to show that they or either of them knew the contents or appreciated the effect of the provisions of the deeds of the 22nd July, 1867.

This appeal, therefore, must be decided on the assumption that the above-mentioned daughters of Ananthakrishna did not agree to surrender their interests in the properties of their father, and that they did not consent to and acquiesce in the deeds of the 22nd July, 1867.

The principle applicable to the power of surrender by a Hindu widow is well settled and may be stated as follows:—

"A Hindu widow can renounce in favour of the nearest reversioner if there be only one, or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death. The landmark of decision as to this may be taken as the case of *Behari Lal* v. *Madho Lal*[2], where, in delivering the judgment of the Board, Lord Morris said: 'It may be accepted that according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate so that the whole estate should get vested at once in the grantee'."

See the judgment of the Board delivered by Lord Dunedin in *Rangasami Gounden* v. *Nachiappa Gounden*.[3]

It is clear that the widow, Thayammal, by executing the deeds in July, 1867, and disposing of her property thereby, did not renounce her interest in favour of the nearest reversioners. Her two daughters, Thailammal and Lakshmiammal, were the nearest reversioners, and they took no interest in the properties under the said deeds.

The conditions, therefore, necessary to create a valid surrender by the widow, Thayammal, were not present.

It was, however, argued on behalf of the appellants that the surrender by the widow was valid, because the daughters Thailammal and Lakshmiammal, consented to the transactions carried out by the deeds of July, 1867, so as to efface their own interests, and that consequently not only the interests of the widow, but also the interests of her daughters in the property, were effaced.

2. (1891) L.R. 19 I.A. 30: I.L.R. 19 C. 236 (P.C.).
3. (1918) L.R. 46 I.A. 72: I.L.R. 42 M. 523: 36 M.L.J. 493 (P.C.).

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Their Lordships are relieved from the necessity of expressing any opinion on the important question of law involved in this contention, in view of their above-mentioned conclusion that it was not proved that the daughters, Thailammal and Lakshmiammal, did in fact consent or acquiesce in the said transactions.

That conclusion is sufficient to dispose of the first part of the appeal, and for that reason, and without expressing any opinion on the other points hereinbefore referred to, their Lordships agree with the High Court that there was no valid surrender by the widow Thayammal of her interest in the properties of her deceased husband.

The only other question relates to the amount of compensation fixed by the High Court in respect of the improvements, *viz.,* Rs. 5,800.

The appellants contended that the compensation for the house should have been at least on the basis of the Commissioners' valuation, *viz.,* Rs. 10,000.

The High Court took Rs. 8,000 as the value of the whole structure; they held that the defendants, who were entitled to compensation in respect of the Rs. 4,000 out of Rs. 5,500 spent by their father, are entitled to eight-elevenths of Rs. 8,000 —or roughly, Rs. 5,800.

Their Lordships are of opinion that the said sum of Rs. 5,800 is sufficient compensation. Indeed, they are not sure that the said sum is not too much; for the Rs. 8,000 was arrived at by the High Court by allowing an increase in value to the extent of about 50 per cent. upon the total expenditure of Rs. 5,500, whereas the High Court had decided—and their Lordships agree with the decision—that it was not shown that the father of the first defendant *bona fide* believed he was the owner of the property when he expended the sum of Rs. 1,500 (part of the total of Rs. 5,500) in 1903.

There is, however, no cross-appeal in respect of this matter, and the sum awarded by the High Court must stand.

For these reasons their Lordships are of opinion that the appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Chapman, Walker & Shephard.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Velivalli Brahmaiah and others .. *Petitioners** (*Accused*).

Brahmaiah *In re.*

Criminal Procedure Code (V of 1898), *Ss.* 265 *and* 537—*Initials by a Magistrate in a judgment of a bench of three Magistrates—Whether signature would include initials—Legality of.*

Where from the register of summary trials maintained by a First Class Bench of Magistrates, it was clear that a judgment in a case had been in fact signed by only two of the three Magistrates who had heard and decided the case, the other having only initialled, the question that had to be decided was whether S. 265 of the Criminal Procedure Code had been complied with and whether any non-compliance with the provisions of that section would amount to an irregularity which could be cured by S. 537 of the Code.

Held, (1) that a judgment of a Bench of Magistrates has to be signed as required by law and the requirements of public policy necessitate the writing of the full name of the Magistrate that signs the judgment and the mere putting in of the initials is not a sufficient compliance with the mandatory provisions of S. 265 of the Code.

Abdul Gafur v. *Queen-Empress,* (1896) I.L.R. 23 C. 896; *Nirmal Chunder Bandopadhya* v. *Saramoni Debya,* (1898) I.L.R. 25 C. 911 at 915; *Mahabarsha Bankapore* v. *The Secretary of State for India,* (1915) 20 C.W.N. 685, referred to.

(2) that the illustration to S. 537 of the old Code, namely, "the Magistrate being required by law to sign a document, signs it by initials only. This is purely an irregularity and does not affect the validity of the proceedings" being omitted in the amended Code, indicates that the legislature no longer views the defect pointed out in the aforesaid illustration as a mere irregularity not affecting the validity of the proceeding.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the First Class Bench of Magistrates at Guntur in Summary Trial No. 879 of 1929.

V. Pattabhirama Sastri for petitioners.

K. Venkataraghavachariar for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—This is a petition by the accused 1 to 3 against the conviction and sentence of fine passed by the First Class Bench at Guntur. The charge against these accused was under Ss. 504 and 352 of the Indian Penal Code. Apart from the merits of the case, one objection that is taken against the legality of the conviction is, in my opinion, sufficient to set it aside. It is clear from the register of summary trials maintained by the aforesaid Bench, that the judgment has in fact been signed only

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*Cr.R.C. No. 990 of 1929. (Cr.R.P. No. 893 of 1929). 23rd July, 1930.

by two of the three Magistrates who heard and decided the case, the other having only initialled it. The mandatory provision in S. 265 of the Criminal Procedure Code is to the effect, that "a judgment shall be signed by each member of the Bench present taking part in the proceedings." There is no definition of the word "sign" in the Criminal Procedure Code. The word "signing" had been interpreted in some judicial decisions and that meaning can be safely adopted for purposes of the present case. In the two decisions of the Calcutta High Court, namely, *Nirmal Chunder Bandopadhya* v. *Saratmoni Debya*[1] and *Mahabarsha Bankapore* v. *The Secretary of State for India*,[2] the word "signing" has been taken to mean the writing of the name of the person who is the signatory, so that it may convey a distinct idea to others that the writing indicates a particular individual whose signature it purports to be. This question was considered in the first case in respect of a will and in the other case as regards a risk note to be signed and delivered to the Railway Company. In another Calcutta case, namely, *Abdul Gafur* v. *Queen-Empress*,[3] the same question arose in connection with a warrant of arrest issued by a Criminal Court. That warrant was not signed by the Magistrate as required by S. 75 of the Criminal Procedure Code, but it bore only his initials. The legality of the warrant so issued was questioned and it was held that the warrant was not signed as required by law. In view of this defect and some other defect pointed out in that judgment, it was held that the person obstructing the execution of such a warrant could not be convicted under S. 186 of the Indian Penal Code. In a decision of this Court reported in *Lakshmanacharyulu* v. *Venkataramanujacharyulu*,[4] it was held that for purposes of a valid acknowledgment under S. 19 of the Limitation Act, initials are not equivalent to signature. Though there is no direct authority in respect of the word "signed" occurring in S. 265, cl. (2) of the Criminal Procedure Code the meaning attached to that word in the aforesaid decisions can well-nigh be applied to it. A judgment of a Bench of Magistrates has to be signed as required by law and the requirements of public policy necessitate the writing of the full name of the Magistrate that signs the judgment and the mere putting in of the initials is not, in my opinion, a sufficient compliance with the mandatory provisions of S. 265 of the Code.

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1. (1898) I.L.R. 25 C. 911 at 915.
2. (1915) 20 C.W.N. 685.
3. (1896) I.L.R. 23 C. 896.
4. (1926) 51 M.L.J. 414.

Brahmaiah, *In re.*

In this connection, it must be considered whether the initialling by one of the Magistrates in the judgment in question instead of signing, is only an irregularity which can be cured under S. 537 of the Criminal Procedure Code. In the old Code, an illustration was added to S. 537 as follows:—

"The Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity and does not affect the validity of the proceedings."

But in the amended Code, this illustration is omitted. The repeal of this illustration in the amended Code clearly indicates that the legislature no longer views the defect pointed out in the aforesaid illustration as a mere irregularity not affecting the validity of the proceeding. The inference from the omission of this illustration is that the defect affects the validity of the proceeding and vitiates the conviction and sentence.

In the case of trials by a Bench of Magistrates the practice of some of the Magistrates not signing the judgments or putting in merely their initials instead of the full signature is to be deprecated. There seems to be also another practice, namely, that when copies of such judgments are given, the signature of the presiding Magistrate alone is copied, omitting the signatures of the other Magistrates (as was done in this case). Such a copy is obviously an incorrect one and it is inconceivable why the copy should be defective in this important particular. It is hoped that in future the Benches of Magistrates would strictly follow the mandatory provisions of the Code in the matter of signing judgments.

For these reasons stated by me, the conviction and sentence are vitiated by non-compliance with the mandatory provisions of S. 265 of the Criminal Procedure Code. The conviction and sentence have, therefore, to be set aside.

But in the circumstances of this case, it seems to me that the ordering of a retrial is useless and not in furtherance of public interests. I may also point out that though the offences complained of in the present case fell under Ss. 504 and 352 of the Indian Penal Code (as shown by the register), the conviction was under S. 323. There is absolutely nothing in the judgment to show how the accused could be convicted for hurt under S. 323, while the finding seems to be that their guilt was under Ss. 504 and 352.

In the result, the revision petition is allowed and the conviction and sentence are set aside. The fine, if levied, will be refunded to the petitioners.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

Chinna Gangappa ... *Appellant** (*Prisoner*).

Chinna Gangappa *In re.*

Indian Penal Code (XLV of 1860), Ss. 201, 203, 302—Practice and procedure—Conviction by the Court of the accused under Ss. 201 and 203 before being satisfied that he was not himself the murderer—Legality of—Punishment under S. 201.

Where the accused was charged under Ss. 201 and 203 of the Indian Penal Code as well as under S. 302, and was convicted by the Sessions Judge under the two former sections and acquitted under the latter, owing to its being not pressed against him, the question arose whether the accused could be so convicted before the Court was satisfied beyond reasonable doubt that he was not himself the murderer.

Held, that there was no illegality in the conviction under Ss. 201 and 203, as there was no misjoinder in charging an accused in the alternative with the main offence and under Ss. 201 and 203, nor anything irregular or improper in the Judge holding that while the accused himself was not free from the suspicion of being the actual murderer, he would none the less be convicted under Ss. 201 and 203 of the Indian Penal Code

Reg v. *Kashinath Dinkar,* (1871) 8 Bom. H.C.R. (Cr.) 126, dissented from.

Teprinessa v. *Emperor,* (1918) I.L.R. 46 C. 427: *Hanmappa Rudrappa* v. *Emperor,* (1923) 82 I.C. 709: 25 Bom. L.R. 231 and *Bucha* v. *King-Emperor,* (1903) 1 P.R. (Cr.) 1904, followed.

For the purpose of calculating the punishment to be awarded under S. 201, it is necessary for the Court to decide, not so much what offence—the evidence of which has been concealed—has been committed, as what offence the accused knew or had reason to believe had been committed.

Appeal against the order of the Court of Session of the Bellary Division in Case No. 28 of the Calendar for 1929.

V. L. Ethiraj and *M. C. Sridharan* for appellant.

The Public Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The appellant has been convicted by the learned Sessions Judge of Bellary under S. 201, Indian Penal Code, for giving false evidence about the murder of his wife in order to screen the real offender, and also under S. 203 for giving false information about the murder. He was also himself charged with the actual murder of his wife, but was acquitted on that. The facts of the case briefly were:—

On the 12th August, 1929, at about 10 A.M., the deceased woman took food to her husband. P.W. 4 saw her there. He next saw her being carried in an unconscious state by the accused and his brother towards her house. P.W. 5 saw people in

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*Criminal Appeal No. 640 of 1929. 8th April, 1930.

Chinna Gangappa, *In re.*

her house applying restoratives to her, while the accused and his brother were giving out that the woman had been stung by a scorpion or bitten by a snake. She died at 4 P.M. The accused himself made the report to the Village Munsif (P.W. 6), saying that he suspected that she had been stung. The woman's father (P.W. 8) was suspicious and reported to the police who sent the body for *post mortem*. The Medical Officer, P.W. 1, found on the body four contusions three of them on the skull, and on dissecting he found there had been cerebral hæmorrhage. He was of opinion that that was the result of blows by sticks or stones on the head. He found no signs or symptoms of poisonous bite or sting.

The charge of murder was not pressed against the accused in the Trial Court, and the learned Sessions Judge held that the evidence did not prove that it was the accused who inflicted the injuries on his wife. He held, however, that he must have known who inflicted them on his wife and that his story to the Village Munsif was a false one, intended to screen the real offender. He, therefore, convicted him under Ss. 201 and 203, Indian Penal Code.

The learned Counsel for the defence raises a point of fact and a point of law. The point of fact is that as the injuries on the woman were hidden under her hair the accused did not genuinely know that she had been assaulted. But we do not think that there is any substance in this. For, the woman having been assaulted, the accused's story that she cried out she had been stung cannot be true. She must have cried out that she was being beaten and accused must have known that.

The point of law is that unless the Court is satisfied beyond reasonable doubt that accused was not himself the murderer, he cannot be convicted under Ss. 201 and 203. This rests upon a proposition, affirmed in several rulings of various High Courts, that Ss. 201 to 203, Indian Penal Code, have no application to the person who actually committed the main offence mentioned in the sections, and that the person who committed the main offence cannot be himself found guilty of causing evidence of that offence to disappear or of giving false information about it. The earliest pronouncement on this point was in 1871 in a case *Reg* v. *Kashinath Dinkar*,[1] and this ruling has been followed, mostly without discussion or comment as if the proposition were self-evident, in various other cases. (Cf. *Empress of*

1. (1871) 8 Bom. H.C.R. (Cr.) 126.

India v. *Kishna*,[2] *Queen-Empress* v. *Dungar*,[3] *Torap Ali* v. *Queen-Empress*[4] and *Emperor* v. *Ghanasham*.[5] The only pronouncement of this High Court on this subject which has been traced is in a parenthesis and *obiter dictum* at page 277 of *Ramaswami Gounden* v. *Emperor*.[6] Nowhere is the *ratio decidendi* of *Reg*. v. *Kashinath Dinkar*[1] examined. It seems to us to rest on a *petitio principii*. The reason given is that "as there is no law now which obliges a criminal to give information which would convict himself, it is evident that Ss. 202 and 203 could not apply to a person who committed that offence, that is, the offence which he know had been committed." Obviously if there is no law to that effect then Ss. 202 and 203 will not apply. The question rather is whether Ss. 201 to 203 do not embody such a law. On the face of them there is nothing to show that they do not apply to the main offender himself. S. 44 of the Code of Criminal Procedure, which is the generic section relating to the duty of persons to give information about grave offences including murder, and S. 45 (*d*) of that Code which lays on any owner or occupier of land the duty of giving information regarding the occurrence in his village of any sudden or unnatural death, do not in terms exclude the offender himself. These sections of the Code of Criminal Procedure would be relevant in a case under S. 202, Indian Penal Code, where it is necessary that the accused should be legally bound to give information regarding the offence; but even this qualification does not appear under S. 201 or S. 203. What is required there is merely that there should have been an offence and that the accused has given false information about it, with the added intention in the case of S. 201, Indian Penal Code, of screening the offender. We cannot therefore see wherefrom comes the proposition which is the foundation of *Reg* v. *Kashinath Dinkar*[1] that there is no law which obliges a criminal to give information which would convict himself. There is such a law in the case of grave offences and sudden deaths, and in theory the offender himself could be convicted for breach of that law under Ss. 201 to 203, Indian Penal Code. In practice, no doubt, if he has been convicted of the offence itself, no Court will think it worth while to convict him also under Ss. 201 to 203, Indian Penal Code. If the proposition laid down in *Reg* v. *Kashinath Dinkar*[1] is carried to its logical

1. (1871) 8 Bom. H.C.R. (Cr.) 126.
2. (1880) I.L.R. 2 A. 713.
3. (1886) I.L.R. 8 A. 252.
4. (1895) I.L.R. 22 C. 638.
5. (1906) 8 Bom. L.R. 538.
6. (1903) I.L.R. 27 M. 271: 14 M.L.J. 226.

Chinna Gangappa, *In re.*

conclusion it would appear that it is improper to try an accused person, as the present accused has been tried, in the same trial under both Ss. 302 and 201, Indian Penal Code, because a perfect defence to S. 201 would be a plea and proof that he himself was the murderer, and an accused would be entitled to say that the plea he proposes to make to the charge under S. 201 will depend on whether he is acquitted or convicted of the principal offence; and that to call upon him to plead to the charge under S. 201 before and until he knows what the verdict on the murder charge is, would be to deprive him of his legitimate defence. It would also in a case where the Court regards proof of his complicity in the actual offence is insufficient to establish his guilt, compel the Court to let him go free, even though it is satisfied that he gained his acquittal on the main offence by his own concealment of the traces of the crime. This was exactly what happened in *Reg* v. *Kashinath Dinkar*[1] and it is hardly compatible with justice that the actual offender should escape conviction under Ss. 201 to 203 because he is the actual offender in the main crime while those who merely witnessed it but gave false information about it are punishable under Ss. 201 and 203. This means that the more successful a criminal is in concealing his own offence the more the law will assist him in escaping justice altogether, and unless the Court holds without reasonable doubt that the accused did not take part in the murder the Court is bound to give him the benefit of doubt and acquit him of offences under Ss. 201 to 203. The case reported in *Torap Ali* v. *Queen-Empress*[4] is another practical example of how justice is defeated by such a theory of the law. . . .

. . . The true principle seems to be that there is no law preventing the main offender being convicted under Ss. 201 to 203, but in practice no Court will convict an accused both of the main offence and under these sections. But if the commission of the main offence is not brought home to him, then he can be convicted under Ss. 201 to 203. Therefore there is no misjoinder in charging an accused in the alternative with the main offence and under Ss. 201 and 203, Indian Penal Code, nor is there anything irregular or improper in a Judge holding, as the learned Sessions Judge has done in this case, that, while the accused is himself not free from the suspicion of being the actual murderer, he can be none the less convicted under S. 201 or 203. This position is not without authority, though as noted above most of the reported cases have followed *Reg* v. *Kashinath Dinkar*.[1] Most of these rulings have been considered in a

1. (1871) 8 Bom. H.C.R. (Cr.) 126. 4. (1895) I.L.R. 22 C. 638.

Chinna Gangappa, *In re.*

judgment of the Punjab Chief Court in 1903 in *Buch* v. *King-Emperor*[7] wherein it was held that an accused acquitted of the charge of committing a crime can be convicted under S. 201 in respect of the offence "with the commission of which he is no longer charged or liable to be charged" and the mere suspicion that an individual is the actual murderer or the facts that he has even had his trial and been acquitted of the offence of murder will not prevent his conviction under S. 201. A mere suspect or an acquitted accused is not in the eye of the law an offender within the meaning of S. 201. The reported ruling in *Teprinessa* v. *Emperor* [8] is practically to the same effect, and also the ruling of a Bench of the Bombay High Court in *Hanmappa Rudrappa* v. *Emperor*.[9] Therefore there is no illegality in the conviction under Ss. 201 and 203.

This does not however conclude the case. It is clear that for the purpose of calculating the punishment to be awarded under S. 201, it is necessary for the Court to decide, not so much what offence—the evidence of which has been concealed—has been committed as what offence the accused knew or had reason to believe had been committed. So it was necessary to believe, on the assumption that the accused did not commit the main offence because he has not been convicted of that, what offence he believed or knew to have been committed. The Court must treat him as a stranger to the crime, as one who had merely witnessed it.

From that point of view we cannot on the evidence say that more is proved than that the accused knew that some one had hit his wife and that she had died in consequence. We are unable to conclude that he knew that the person who struck her had the criminal intention of killing her. It must have been clear however to the accused that his wife had died as a result of the blows given and that she at least suffered grievous hurt, and that is punishable under S. 325, Indian Penal Code, with imprisonment for seven years. Under S. 201 the accused is then liable to be sentenced to a maximum of one-fourth of that seven years. The learned Sessions Judge has sentenced the accused to rigorous imprisonment for five years. At the most he can be sentenced to one year and three-fourths. We think that it will be sufficient if he undergoes rigorous imprisonment for one year and we reduce the sentence accordingly.

K.C. *Sentence reduced.*

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7. (1903) 1 P.R. (Cr.) 1904. 8. (1918) I.L.R. 46 C. 427.
9. (1923) 82 I.C. 709: 25 Bom. L.R. 231.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

K. T. Muthuveerappa Pillai .. *Appellant** (*Petitioner—Claimant*)

v.

The Revenue Divisional Officer, Melur .. *Respondent* (*Respt.—Land Acquisition Officer*).

Muthuveerappa Pillai *v.* The Revenue Divisional Officer, Melur.

Land Acquisition Act (I of 1894), S. 27—Award, meaning of—Government backing out after reference to Court—Order regarding costs.

Once a proper reference comes before the Court, the order passed is an award, whether the Judge gives an additional amount or not, or whether the Acquisition Officer's decision is not upheld for some other reason, and there should be a direction regarding costs.

Where the award of the Collector was not upheld by the Court because the Government had backed out of the acquisition after the reference was made,

Held, that the claimant was entitled to his costs.

Appeal against the order of the Court of the Subordinate Judge of Madura, dated 6th February, 1928 and made in Land Acquisition Case No. 67 of 1926.

The facts which led up to the appeal were as follows:—

In a proceeding for the acquisition of certain plots of land the Revenue Divisional Officer made an award under S. 11 of the Land Acquisition Act, 1894. The claimant thereupon preferred an application under S. 18 to the District Collector on the ground that the compensation was inadequate. The matter having been referred by the Collector to the Civil Court the following order was passed by the Subordinate Judge:—

"As the acquisition has been declared by the Government to be invalid the reference is incompetent and the proceedings are closed. The claimant claims costs. The reference having been declared to be invalid S. 27 has no application. There was no enquiry. I therefore pass no orders as to costs."

Against this the claimant preferred an appeal to the High Court on the ground that the Court had the power to award costs under S. 27 of the Land Acquisition Act.

T. L. Venkatarama Aiyar for appellant.

The Government Pleader for respondent.

The Court delivered the following

JUDGMENT.—A preliminary objection is taken that the appeal does not lie. It is contended that the order appealed against is not an award and *Dembeswar Sarma* v. *The Collector*

*Appeal No. 427 of 1928. 29th April, 1930.

Muthu-veerappa Pillai *v.* The Revenue Divisional Officer, Melur

of Sibsagar,[1] *Banshidhur Marwari* v. *The Secretary of State for India*[2] and *Sarat Chandra Ghose* v. *The Secretary of State for India*[3] are relied on. In the first of these cases the application for reference was made beyond the time allowed. No reference ought to have been made in that case and the District Judge refused to make an award on that ground. The High Court held properly that no appeal lay. In *Banshidhur Marwari* v. *The Secretary of State for India*[2] the appeal was against an order refusing to restore a case dismissed for default. In *Sarat Chandra Ghose* v. *The Secretary of State for India*[3] the order was made under S. 49 of the Act. All these cases are distinguishable.

Once a proper reference comes before the District Judge, his final order on it is an award whether he gives an additional amount or he gives no additional amount or whether the acquisition officer's award is not upheld for some other reason like the one in this case. S. 27 (3) of the Land Acquisition Act supports this conclusion. The words are "where the award of the Collector is not upheld." This is such a case the reason being that Government backed out of the acquisition. We overrule the preliminary objection.

As to the amount, it is stated before us—and we have no reason to disbelieve the statement—that Rs. 188 represents the total costs incurred including vakalat, stamp, pleader's fee and witness batta. Seeing that out of the ten adjournments which the case received, three were at the instance of the appellant and seven at the instance of the Government, we think Rs. 120 for batta and other expenses and Rs. 20 for pleader's fee, that is Rs. 140, is all the sum to which the appellant is properly entitled. We accordingly modify the order of the Court below by directing that the respondent will pay Rs. 140 towards the appellant's costs.

The respondent will pay the appellant's costs for the appeal.

B.V.V. *Order modified.*

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1. (1917) 39 I.C. 637. 2. (1926) I.L.R. 54 C. 312.
3. (1919) I.L.R. 46 C. 861.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Arumuga Nadar .. *Petitioner**

v.

Vyyapuri Chetti *alias* Muthayan Chetti .. *Respondent.*

Arumuga Nadar *v.* Vyyapuri Chetti.

Village Courts Act (I of 1889), S. 13—Jurisdiction—Whether suit for damages for breach of contract is cognizable by a Village Court—Meaning of "claims for money due on a contract."

Two suits were brought for damages for breach of contract in the Panchayat Court of a village. The question is whether the words "claims for money due on a contract" in S. 13 of Village Courts Act include suits for damages for breach of contract, and as such cognizable by the Village Court.

Held, that not only upon a grammatical construction of the section where the word 'due' of itself rather connotes that the sum sued for must be ascertained but upon general considerations that the principles upon which damages should be awarded are not easily grasped except by trained lawyers and the discretion as to the amount of damages to be awarded may vary within wide limits, it cannot have been the intention of the legislature to include such suits as triable by a Village Court.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif of Manamadura, dated 14th October, 1929, and made in O.P. Nos. 50 and 51 of 1929, respectively.

K. P. Panchapagesa Aiyar for petitioner.

A. Venkatarayaliah and *L. Venkatanarasiah* for respondent.

The Court delivered the following

JUDGMENT.—Two suits (C.S. Nos. 6 and 7 of 1929) for damages for breach of contract were filed in the Panchayat Court of Tiruchuli against the petitioner in these two revision petitions. The plaintiff in Suit No. 6, corresponding here to C.R.P. No. 1766 of 1929, appears as respondent. The respondent to the other petition is absent. The contention of the petitioner is that the Panchayat Court had no jurisdiction to try these suits, and upon this ground he presented petitions for transfer to the District Munsif of Manamadura under section 21 of the Village Courts Act. The learned District Munsif has dismissed the petitions and I am now asked to say that his decision on this question of jurisdiction is incorrect. The respondent in C.R.P. No. 1766 of 1929 raises the point that this objection to jurisdiction was not taken at the earliest possible moment, namely, in the written statement, and I find that while the written statement to C.S. No. 7 does contain such a protest, there is no corresponding plea in that to C.S. No. 6. I do not think, however, that this is a very serious objection. The

*C.R.Ps. Nos. 1766 and 1767 of 1929. 30th April, 1930.

Civil Procedure Code does not apply to proceedings before the Village Courts and we cannot expect litigants in such Courts to adopt the procedure which it lays down. The objection was taken before the District Munsif as a ground for transfer and must, I think, now be decided upon its merits.

The question depends upon the construction to be placed upon the words "claims for money due on contract" which under section 13 of the Act is one of the classes of suits cognizable by Village Courts. The learned District Munsif is of opinion apparently that because the Act applies to a Village Court, this phrase may be read in some vague or general manner. I am unable to follow him in this view or to agree that it is necessarily a nice distinction to distinguish between suits for money due on the contract and suits for damages due for breach of contract. Nor do I understand how he gains assistance from the terms of the provisos to section 13, because those clearly relate to the exclusion of special cases to which the body of the section would apply in their general aspect. I think that suits for money due on a contract are of a clearly definable nature, as, for instance, a suit for the price of goods sold or for wages for labour performed. These are ordinarily suits of a simple character and for ascertained sums. The word "due" I think of itself rather connotes that the sum sued for must be ascertained, but if we look to the nature of a suit for damages for breach of contract it appears to be of quite a different class from a suit to enforce the payment of money due under a contract, and moreover, it becomes extremely doubtful whether the Legislature can have intended to invest the Village Courts with power to try suits of this latter class. Such cases are often very difficult. The principles upon which damages should be awarded are not easily grasped except by trained lawyers and the discretion as to the amount of damages to be awarded may vary within wide limits. I think, therefore, not only upon the grammatical construction of the section but upon general considerations of this latter kind, it cannot have been the intention to include such suits as triable by a Village Court.

I must accordingly allow these petitions, set aside the orders of the District Munsif and direct him to transfer the two suits C.S. Nos. 6 and 7 of 1929 on the file of the Tiruchuli Panchayat Court to the file of his Court. The petitioner will get his costs in both the petitions in the two Courts.

K.C. *Petitions allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE SUNDARAM CHETTY AND MR. JUSTICE PAKENHAM WALSH.

Thaticherla Pichamma .. *Appellant** *(1st Respondent)*

v.

The Official Receiver of Cuddapah and others .. *Respondents* *(Petitioner and Respondents 2 to 4).*

F. B.

Thaticherla Pichamma *v.* The Official Receiver of Cuddapah.

Provincial Insolvency Act (V of 1920), as amended—S. 53—Two years' period—Computation—Amendment Act (X of 1930), S. 6—Retrospective effect.

S. 6 of the Provincial Insolvency Amendment Act X of 1930, which makes it clear that the period of two years mentioned in S. 53 of the Provincial Insolvency Act of 1920 should be computed from the date of the presentation of the petition for adjudication, takes effect retrospectively so as to apply to pending proceedings.

Veerappa Chettiar v. *Subramania Aiyar,* (1928) I.L.R. 52 M. 123: 55 M.L.J. 794 (F.B.), relied on.

Appeal against the order of the District Court of Cuddapah, dated 3rd February, 1928, in O.P. No. 73 of 1926.

T. V. Muthukrishna Aiyar for appellant.

Kasturi Seshagiri Rao for *B. Somayya* for 1st respondent.

G. N. Thirumalachariar for 2nd and 3rd respondents.

The Court (Anantakrishna Aiyar and Cornish, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—The 4th counter-petitioner T. Venkayya was adjudicated insolvent on 13th March, 1925, on a petition filed by a creditor on 4th February, 1924. The insolvent executed on 20th March, 1922, a sale-deed (Ex. II) and a mortgage deed (Ex. III) in favour of his wife, the first counter-petitioner. A petition was filed by the Official Receiver, Cuddapah, in the District Court on 7th August, 1926, for an order that Exhibits II and III be annulled and declared void as against the Official Receiver under section 53 of the Provincial Insolvency Act (V of 1920). The learned District Judge passed orders annulling Exhibits II and III and declaring them void as against the Official Receiver. The first counter-petitioner, the wife of the insolvent, has preferred this appeal; and on her behalf it was argued that the learned District Judge had no jurisdiction to

*C.M.A. No. 163 of 1928. 30th July, 1930.

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pass the order annulling the said transfers, because under section 53, he could do so only "if the transferor is adjudged insolvent within two years after the date of the transfer." The question is whether transfers made within two years prior to the presentation of the petition for adjudication as insolvent, but which are beyond two years from the date of the actual order of adjudication, could be annulled under section 53 of the Act.

There has been difference of opinion on this question among the several High Courts in India. The Calcutta and the Madras High Courts have taken the view that such transfers could be annulled if they are within two years prior to the date of the presentation of the petition for adjudication: see *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose*[1]; *Sankaranarayana Aiyar* v. *Alagiri Aiyar*[2], *Rangiah* v. *Appaji Rao*[3] and *Venkatanarasayya* v. *Official Receiver, Godavari*[4]; whereas the High Courts of Bombay, Rangoon and Lahore have taken the opposite view: see *Nagindas* v. *Gordhandas*[5], *Maung Pe* v. *Maung Po Htein*[6] and *Hem Raj* v. *Krishen Lal*[7]. It was mentioned that the view of the Allahabad High Court is the same as that of the Madras High Court: *Sheonath Singh* v. *Munshi Ram*,[8] but on referring to the report we find that the question before the Court was not with reference to any transfer prior to the date of the petition for adjudication but in respect of a transfer made by the insolvent between the dates of the presentation of the petition and the order of adjudication. The decision in *Hem Raj* v. *Krishen Lal*[7] is that of a Full Bench of that High Court. The various arguments in support of the respective contentions have been set out in that decision and the Indian case-law on the point also is mentioned.

Under ordinary circumstances we should have felt bound to follow the three decisions of this High Court mentioned above, more especially as the learned Judges in *Venkatanarasayya* v. *Official Receiver, Godavari*[4], "saw no reason for referring the question to a Full Bench" (*see* page 139). We ordinarily in the circumstances would have rest satisfied with throwing a strong suggestion that it is pre-eminently a case for the Legislature to intervene and make matters clear on such

1. (1919) I.L.R. 46 C. 991.
2. (1918) 35 M.L.J. 296.
3. (1926) I.L.R. 50 M. 300: 51 M.L.J. 719.
4. (1927) 53 M.L.J. 136.
5. (1925) I.L.R. 49 B. 730.
6. (1928) I.L.R. 6 R. 193.
7. (1928) I.L.R. 10 L. 106 (F.B.).
8. (1920) I.L.R. 42 A. 433.

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an important point; but we have been pressed with the change of language used in sections 51 to 55 and also section 73 of the Provincial Insolvency Act. Though sections 53 and 54 deal with analogous matters, the words used in section 53 are —"If the transferor is adjudged insolvent within two years after the date of the transfer" while the words used in the very next section, S. 54, are—"If such person is adjudged insolvent on a petition presented within three months after the date thereof". The wordings of the other sections 51, 52, 55 and 73 are also different. In a very recent case, *Ramanandi Kuer* v. *Kalawati Kuer*[9], the Privy Council point out that:

> "Where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded."

Though the Calcutta and the Madras decisions seem to carry out the policy of the Legislature, we are not clear whether the words of section 53, if interpreted according to the canon of construction enunciated by the Privy Council, support that interpretation. We think that in the circumstances the question should be decided by a Full Bench of this Court.

We accordingly refer for the decision of a Full Bench the following question:—

> "Whether a transfer of property of the description given in section 53 of the Provincial Insolvency Act (V of 1920) made by an insolvent more than two years before the date of the actual order of adjudication but within two years of the date of the presentation of the petition for adjudication could be annulled by the Court under section 53 of the Act at the instance of the Official Receiver."

T. V. Muthukrishna Aiyar for appellant.

B. Somayya and *Kasturi Seshagiri Rao* for 1st respondent.

G. N. Thirumalachariar for 2nd and 3rd respondents.

The opinion of the Full Bench was delivered by

Sundaram Chetty, J.

Sundaram Chetty, J.—The question referred to us for decision runs as follows:—

> "Whether a transfer of property of the description given in section 53 of the Provincial Insolvency Act (V of 1920) made by an insolvent more than two years before the date of the actual order of adjudication but within two years of the date of the presentation of the petition for adjudication could be annulled by the Court under section 53 of the Act at the instance of the Official Receiver."

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9 (1927) L.R. 55 I.A. 18: I.L.R. 7 P. 221: 54 M.L.J. 281 (P.C.).

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The decision of this question depends upon the correct interpretation of the wording in section 53 of the Act. The portion of the section relevant for our purpose is where it says that the adjudication of the insolvent should have been made within two years after the date of the transfer. As to the meaning to be attached to the point at which limitation has to be computed, there has been a conflict of judicial opinion. This High Court as also the Calcutta High Court has been of one opinion, namely, that a petition to annul an alienation can be filed if it is within two years before the presentation of the insolvency petition. The decisions of these High Courts proceeded on the view that the adjudication relates back to the presentation of the petition and following the view taken in the English decisions it has been so held. But a different view has been taken by the High Courts of Bombay, Rangoon and Lahore. The question of interpreting the section is not quite free from difficulty; but in view of the recent amendment of this section by Act X of 1930, which received the assent of the Governor-General on the 20th March, 1930, any doubt on this matter must be taken to have been set at rest.

The only point now to be considered is whether the amendment made by section 6 of this Act has a retrospective effect, that is, will apply to a pending proceeding such as the one in question. If by means of this amendment, a new or altered period of limitation is prescribed, then it may be for consideration whether such an alteration in the law will have retrospective effect or not; but what would appear from the Statement of Objects and Reasons in connection with this amending Act is that, in view of different interpretations having been put by several High Courts which led to a conflict of view, the Legislature wanted to set that doubt at rest by declaring clearly what the real meaning of the expression in the section was. By the insertion of the words "on a petition presented" after the words "is adjudged insolvent" the meaning is made clear and that meaning is in accordance with the view taken by this High Court and the Calcutta High Court. If the amendment in question has not introduced a new period of limitation but has only clarified the meaning of the old section, there is no doubt that it must be taken to apply to the present case. The recent Full Bench decision of this Court in *Veerappa Chettiar* v. *Subramania Aiyar*[10] supports the view which we are taking. The case was in respect of an amendment made to a certain section

10. (1928) I.L.R. 52 M. 123: 55 M.L.J. 794 (F.B.).

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in the Transfer of Property Act as to the meaning of the word "attestation" and it was held that that amendment had retrospective effect. It is difficult to distinguish in principle the present case from the one dealt with by the Full Bench. That being so, we think it unnecessary to canvass the decisions of the several High Courts which were given under section 53 of the Act before the amendment. We, therefore, answer this question in the affirmative.

K.C. *Question answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Sangali Vasudeva Rao .. *Appellant* (Plaintiff)*

v.

The Municipal Council, Anantapur, represented by its Chairman .. *Respondent (Defendant).*

Vasudeva Rao v. The Municipal Council, Anantapur.

District Municipalities Act (V of 1920), S. 80 and Schedule IV, Rr. 7, 8 and 9—Quinquennial revision—Assessment lists not properly signed or verified by Chairman—Particulars in columns not filled up—Validity—Taxing enactment—Construction of—Civil Procedure Code (V of 1908), Ss. 2, cl. (17) and 80—"Public officer"—Municipality, if a.

In the quinquennial revision of assessment of property tax in the Municipality of Anantapur made by a Committee appointed for the purpose, many of the columns in the assessment lists were not filled up when they were submitted to the Chairman. The lists contained the signature of the Chairman in the last but one page. One of them bore no date and the others were dated long before the lists were prepared. There was nothing else to show that the Chairman scrutinised and approved their contents and that he was satisfied with the revision.

Held, the assessment lists, in the absence of his statement in writing of the revised amount of assessment and his certificate of its correctness (as directed by Article 70 of the Municipal Account Code, 1926) cannot be said to be "revised by the Chairman" within the meaning of R. 8, Schedule IV.

Rule 7, Schedule IV of the Act states in imperative language that the Chairman shall enter the annual value of the area and the amount of tax payable. Where these columns were not filled up at all at the time of notice to the assessees calling on them to submit their objections, the omission is in violation of the statute, sufficient by itself to render the revision proceedings invalid. "Taxing enactments should be strictly construed. Conditions precedent to the imposition of any tax should be strictly complied with."

Municipal Council, Cuddapah v. *M. & S. M. Ry. Co., Ltd.*, (1929) I.L.R. 52 Mad. 779: 57 M.L.J. 471, referred to.

Quaere: If the omission to mention the specific date for hearing the objections in the notice issued under R. 9 of Schedule IV is such a vital defect as will vitiate the entire proceedings.

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*S.A. No. 266 of 1929. 9th April, 1930.

Where the resolution to increase the tax from the 1st April was passed and notified before that date, but was published in the District Gazette a few days later than that date, it cannot be said that the decision was given retrospective effect.

The Municipality is not a "public officer" within the meaning of Ss. 2, cl. (17) and 80 of the Civil Procedure Code and no notice prior to suit is necessary.

President of the District Board, South Kanara v. *Gopalakrishna Bhatta*, (1923) I.L.R. 46 Mad. 808: 45 M.L.J. 125 and *Metropolitan Meat Industry Board* v. *Sheedy*, (1927) A.C. 899, referred to.

The question, if the duty of revising the assessment books imposed by R. 8 of Schedule IV of the Act can be delegated by the Chairman to a Committee, left open.

Appeal against the decree of the District Court of Anantapur in A.S. No. 110 of 1928 preferred against the decree of the Court of the District Munsif of Anantapur in O.S. No. 508 of 1928.

B. Sitarama Rao and *A. Lakshmayya* for appellant.

B. Somayya for respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit instituted by the plaintiff against the Municipal Council of Anantapur and its Chairman for an injunction restraining them from collecting house tax, education tax and water tax; and it raises the question of the validity of the quinquennial revision under the District Municipalities Act V of 1920, Schedule IV, Rule 8 of the annual rental value of the lands and buildings within the municipal limits in the official year 1927-28 and of the increase of the rate of the tax which was changed from 6¼ to 7½ per cent. under S. 80 of the Act. The District Munsif dismissed the suit as against the Chairman and granted an injunction as against the Council. On appeal by the Municipal Council the decree of the Lower Court was set aside except as regards the enhancement of the rate of water tax. In this second appeal the plaintiff confines his relief only to the house tax.

The facts are briefly these: The plaintiff owns three houses, No. 305 in Ward No. 1 of the Municipality and Nos. 537 and 896 in Ward No. 2. Under rule 8 of Schedule IV of the District Municipalities Act which authorises the Municipal Chairman once in every five years to completely revise the "assessment books" proceedings were started in the Municipality of Anantapur in the official year 1927-28 for a revision of the annual value of the lands and buildings. On 23rd July, 1927, the Chairman proposed to the Council that a Committee be appointed to carry out the revision (*see* Exhibit N). A

Committee of three members of the Municipality was accordingly appointed by the Council for that purpose and the revised assessment lists were prepared by that Committee. Afterwards, two notifications were issued in the District Gazette (Exhibit D in English and Exhibit E in Telugu, dated 5th January, 1928). These were issued under the name of the Chairman and stated that the Municipal Council proposed to revise the assessments from 1st April, 1928, that revision petitions would be considered if submitted by the 6th February, and that revision lists could be seen in the Municipal Office from 11 A.M. to 5 P.M. daily. This notification was tom-tomed on 5th January, 1928 (*see* Exhibit V). No revision petitions were as a matter of fact received. On 28th January, 1928, the Chairman proposed that the rate of property tax now in force be raised to 7½ per cent. of the rental value and this was passed by the Council (*see* Exhibit II-A, the minute book). On 5th February, 1928, the notice, Exhibit F, was issued in the District Gazette in the name of the Chairman that the Council proposed to levy house tax at 7½ per cent. on the annual rental value of each building with effect from 1st April, 1928, and that objections would be considered until 10th March, 1928. This information was also tom-tomed (*see* Exhibit V-B). No objections were received and the Municipal Council confirmed this rate in its resolution (Exhibit II-B, dated 17th March, 1928). This was published in the immediately next issue of the District Gazette, dated 5th April, 1928 (*see* Exhibit H) under the signature of the Chairman, dated 19th March, 1928, and was tom-tomed on the same date (*see* Exhibit V-D). The Gazette notification, Exhibit H, states that the new rates of the house tax at 7½ per cent. on the annual rental value would come into effect from 1st April, 1928.

On the above facts, it is argued that the revision proceedings are invalid, inasmuch as they were carried out *not* by the Chairman as required under the Act (*see* rule 8, Schedule IV), but by a Committee, that even if the delegation of the Chairman's powers to the Committee is valid, the procedure adopted by the Chairman and the Committee in carrying out the revision is vitiated by non-compliance with the statutory requirements, and that the notification calling for objections is invalid as it specified no date for hearing objections. These arguments relate to the validity of the quinquennial revision proceedings relating to the value of the lands and buildings. It is also argued that the enhanced rate of 7½ per cent. is unenforceable as the notification, Exhibit H, sought to give retrospective

effect to the decision of the Municipality to enhance the rate. The respondent besides contesting these points argues that the plaintiff's suit is not maintainable for want of notice under S. 80 of the Code of Civil Procedure.

I shall first deal with the question of the validity of the quinquennial revision proceedings. What happened in this case has already been stated. On 23rd January, 1927, the Chairman proposed to the Council that a Committee be appointed to carry out the revision and a Committee of three members was accordingly appointed to carry out the work. The actual assessment list for the two Wards containing entries "relating" to the plaintiff's three houses, Exhibits A, B and C, were prepared by this Committee. Rule 8 of Schedule IV of the District Municipalities Act states that "the assessment books shall be completely revised by the Chairman." Having regard to this rule, it is argued that the Chairman should not have delegated the work of revision to anybody else and he having done so, the revision carried out by the Committee is not a revision in accordance with the Act and the whole proceedings are consequently invalid. I am not sure if this argument is correct. Pushed to its logical conclusion it may lead to absurd results. It is clear that the Chairman is not expected to do by himself all the work in connection with the revision proceedings. Provided he checks and accepts the work done by his employees, the final result will be his work for which he will be responsible. S. 18, cl. (1) and cl. (3) specially of the District Municipalities Act empower the Chairman to a certain extent, to delegate his executive powers to others. The Municipal Account Code, 1926 (second edition corrected up to 5th September, 1919), Article 70 provides the following procedure for a general revision:—"Under S. 66 (2) of the Act, the assessment books are to be completely revised by the Chairman at least once in every five years. Such revision should be conducted by the Chairman himself or by one or more Councillors deputed by him to carry out the revision in Wards other than their own. They may be assisted by Assessors if required. . . As soon as the assessment list for a locality is completed, it shall be submitted to the Chairman for scrutiny and approval unless the list has been prepared by the Chairman himself. The Chairman after being satisfied with the revision shall countersign the assessment lists, the total amount of the assessment as revised being written in words and certified to by him." S. 66 (2) of the old Act under which this rule was framed corresponds to Rule 8, Schedule IV of the present District

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Municipalities Act. In the Government Edition of the Code, Rule 8, Schedule IV has not been substituted for S. 66 (2) (but it is conceded the rule is still in force). Reliance is placed on this rule by the respondent in justification of the procedure adopted by the Chairman in the present case. In the view that no more delegation than is countenanced by this rule is sought to be justified and having regard to my opinion, which I shall presently state as to whether this rule was complied with by the Chairman, it is not necessary in this case to consider the abstract question whether the duty of preparing the assessment list under Rule 8, Schedule IV can be delegated by the Chairman under the provisions of the District Municipalities Act. Assuming that the Chairman is entitled to carry out the work of revision through the Committee appointed by him or by the Council, the questions arising for consideration are: (1) how far has he in doing so complied with the procedure prescribed in Article 70 of the Municipal Account Code? and (2) how far has the Committee which is only an *alias* for the Chairman in carrying out the actual work of revision complied with the statutory requirements? The two questions will be discussed separately. Under Article 70 of the Municipal Account Code, (1) the assessment list shall be submitted to the Chairman for scrutiny and approval in case, as here, the assessment list has not been prepared by the Chairman himself, and (2) the Chairman shall write in words and certify the total amount of the assessment as revised and shall countersign the assessment list after being satisfied with the revision. On these questions generally considered, the learned District Judge has come to the conclusion that the Chairman has complied with this rule except in one particular, namely, that he did not write in words the total amount of the assessment as revised and certified to it and this omission the learned Judge is apparently of opinion is not a very material defect and does not vitiate the proceedings.

I am not satisfied that the provisions of the rule have been followed by the Chairman in this case. I shall not at present refer to what I consider to be the illegalities committed by the Commissioners in the preparation of the lists. That question, as I have said, I shall discuss separately. The evidence in the case shows how *casually* and *carelessly* the work of revision was carried out in this Municipality. The assessment lists were prepared by the sub-committee in December, 1927. When these were sent to the Chairman (*i.e.*, "the Vice-Chairman in charge" during the proceedings is to be understood as "Chair-

man") it is admitted that many of the columns had not been filled up by the Commissioners. How this omission on their part affects the validity of proceedings will be described later. What is important here to notice is that except the signature of the Chairman contained in these assessment lists, there is nothing in them to show that the Chairman *scrutinised* and *approved* their contents and that he was *satisfied* with the work of revision. As already pointed out, "the total amount of the assessment as revised" has not been "written in the words" by him nor has its correctness been certified to by him as specifically required by Article 70. We are asked to infer from the *signature* of the Chairman appearing in these lists and from the mere *signature* alone that every condition which is imposed upon him by this Article has been complied with by him. The previous assessment in 1923 was also carried out by a Committee. The present Chairman was a member of that revising committee, and that Committee submitted a report along with the assessment (*see* Exhibit IV). It is admitted that no such report has been submitted by the Committee in the present case. The usefulness of such a report is obvious. It would naturally elucidate the procedure adopted by the Committee, explain how the figures mentioned in the lists were arrived at, and state generally how the revision was carried out, so as to enable the Chairman when the lists are submitted to him to scrutinise and approve them, so that when the lists finally emerge out from the office with his signature and certificate, it might be truly said that the revision has been carried out by him as required under Rule 8 of Schedule IV. I do not state that the absence of such a report would vitiate the proceedings; I am only pointing out how such a report would be useful to the Chairman and also helpful to the Court when the available evidence is very meagre in dealing with the question whether the Chairman would be presumed to have really scrutinised and approved the lists prepared by his deputies. As I have said, we are asked to draw all the necessary inferences in support of the validity of the assessment lists in this case so far as the Chairman's part in its production is concerned from the mere signatures which appear in the lists. Can we do so is the question? These signatures do not appear at the end of the lists. In the assessment list containing Exhibit A the signature of the Chairman without any date appears at page 14. There are two entries relating to two assessees at page 15, the last page of that assessment book. There is no signature of the Chairman on that page. The omission is not accounted for. Even if it should be held that we should infer the approval of the Chairman from his signature

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alone, how can we say that the entire list is approved by him when his signature does not appear on the last page? In the second assessment book relating to entries, Exhibits B and C also, the Chairman's signature appears on the last but one page and below it appears the date, 20—10—27. The last page contains the names of various people and entries in the columns as against those names. There is no signature of the Chairman on this page. The omission like the one in Exhibit A is not accounted for. The date 20—10—27 appearing under the signature in the second assessment book creates some difficulty. According to the evidence of the manager (D.W. 1) "the revision of taxes was begun and finished in December, 1927." He distinctly says that Exhibits B and C (*i.e.,* the second book) were prepared in December, 1927. He also says that the revision lists were completed in December, 1927. How is it then that the Chairman's signature is dated 20th October, 1927, and how can we say that he scrutinised and approved on 20th October, 1927, the contents of the lists the preparation of which was completed only in December, 1927. The date appearing under the signature is not stated to have been put there on account of any mistake. The Chairman's evidence on this point is not very illuminating. He says that the registers were completed by the 20th December last. This is mentioned probably to explain the 20th, that appears in Exhibits B and C. But it is in October and not in December. It is not stated in the evidence that October was written by mistake for December. Exhibit A was completed by the 28th December. I have already pointed out that no date appears under the signature of the Chairman in Exhibit A. I cannot say that from the single circumstance of the Chairman's signature appearing in these lists that the rule invoked by the respondent in support of the procedure adopted has been complied with. The signature alone unaccompanied by the "writing of the amount of the assessment in words by the Chairman and his certificate of its correctness means absolutely nothing." It is the writing of the amount of assessment as revised by the Chairman and his certificate of its correctness that are important; for, these are the requirements the fulfilment of which will presumptively show that the Chairman has 'scrutinised' and 'approved' the lists and is satisfied with the revision. In the absence of the Chairman's statement in writing of the amount of assessment as revised and his certificate, the revision of the assessment can be considered only as a revision by the Committee alone which is not authorised by

the Act. As is suggested by the rule itself, these conditions are insisted on by it, apparently only to minimise as far as possible the dangers that are inherent in delegation; for, if the Chairman himself does the work of revision, no such statement or certificate is required from him. In my opinion, the learned Judge has altogether missed the importance of this provision in the rule. It is too much to ask the Court to infer from the mere signature of the Chairman in the absence of his "*statement and certificate*" that he has brought his mind to bear upon the work of his deputies, tested it, and thus made their work in a sense his own by approving it. Assuming that the Chairman of the Municipality has every power to delegate his work of revision as he has done in this case, I am satisfied that the assessment lists in this case, in the absence of his statement in writing of the amount of assessment as revised and his certificate of its correctness, cannot be said to be "revised by the Chairman" within the meaning of Rule 8, Schedule IV, as the procedure prescribed in the Municipal Account Code has not been complied with by him so far as it concerns him. This omission cannot be brushed aside simply as a mere irregularity. In my opinion, Article 70 has not been followed in substance or in fact by the Chairman. These defects which I have pointed out are by themselves enough, I think, to render invalid, under Rule 8, Schedule IV, the revision of the assessment said to have been carried out by the Chairman in this case.

However, I shall now proceed to consider the next question, namely, how far the Committee in carrying out the proceedings relating to the revision and in preparing the revised assessment lists has complied with the necessary statutory requirements. At the outset I should point out that in the plaint this is not made a ground of attack against the revision proceedings, but as the point has been dealt with by the Lower Courts and as the issue as pointed out by the learned District Judge is very vague, I shall deal with it. Under Rule 7, Schedule IV of the District Municipalities Act, "The Chairman shall enter the annual value of all lands and buildings determined by him and the tax payable thereon in assessment books to be kept for the purpose at the Municipal Office," and the rule then proceeds to state that the assessment books shall record amongst other particulars "(*e*) the annual value of the area. . . . " and "(*f*) the amount of the tax payable". It will be observed that these two items (*e*) and (*f*) are very important as (*e*) forms the basis on which the tax is to be levied, and (*f*) states the amount of tax that would be levied. Rule 8, as already pointed out, authorises

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the Chairman to completely revise the assessment books in every particular and if the annual value has been increased as a result of the revision then such increase and the consequent increase in the amount of the tax payable will have to be noted by the Chairman in the assessment books. Rule 9 is as follows:—

"When assessment books have been for the first time prepared, and whenever they have undergone a general revision, the Chairman shall, before the close of the year in which the said books have been prepared or revised, notify by beat of drum and by a notice published in the District Gazette that on a specified date, not being less than thirty days from the date of the later of such notifications, he will be prepared to consider revision petitions presented to him within the said period of thirty days."

This rule calls upon the assessees to put forward their objections. It is clear that to prefer objections the parties should know whether the annual value of the land and the tax payable have been increased. It is argued that the revised assessment lists do not contain the necessary particulars in regard to these matters and that, therefore, the statute has not been complied with and the revision is necessarily invalid. I shall examine how far the facts support this argument.

Now, in these two assessment lists containing the entries A, B and C there are various columns for entering figures under different heads. As I have already stated, these lists were completed and put up in the office for the information of the public by the end of December, 1927. It is admitted that figures in columns 16, 17 and 18 were entered into the lists only in March. All the columns should have been filled up in a completed and properly prepared list before its publication—at any rate before the issue of the notice calling for objections. The non-entry of the figures in these columns, I am referring to it only by the way, is another instance to show how unsatisfactorily the revision work was done in this Municipality. What is important to notice is that in the assessment book relating to house No. 305, Exhibit A, *columns* 13 *and* 15, under "Revised assessment" headed respectively "Annual value" and "Amount of half-yearly assessment" *have not been filled up at all.* In column 14 headed "Annual rental, if rented" appears the figure 60 which figure appears in column 7 headed "Annual value" under "Past year's assessment". These figures appear as follows:—

Past Year's Assessment.		Revised Assessment.		
No. in Assessment Register.	Annual value.	Annual value.	Annual rental, if rented.	Amount of half-yearly assessment.
6	7	13	14	15
305	60		60	

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In Exhibit A, how the same amount under past year's assessment under "annual value" appears as "annual rental" has not been explained satisfactorily by Mr. Somayya. The vital defect in connection with this assessment list is that the "annual value" and the "amount of half-yearly assessment," columns 13 and 15, have not been filled up at all. It is easy to say that if 10 per cent. is deducted from the annual rental under S. 82, we would get the "annual value". Then the annual value under the revised assessment will be less than the annual rental under past year's assessment; but it is not clear that this is the case of the respondent. Further, the work of finding out the annual value by making the necessary deduction should not be left to the assessee. However that may be, the fact remains that "the annual value," column 13, has not been filled up and column 15, "the amount of half-yearly assessment," has also been left open. Now Rule 7 (Schedule IV of the Act) states in imperative language that the Chairman shall enter the annual value of all lands and buildings determined by him and the tax payable thereon in assessment books to be kept for the purpose at the Municipal Office. And it then states that the assessment books shall record the following particulars, namely, the annual value of the area and description and the amount of tax payable [cls. (*e*) and (*f*)] . No explanation is forthcoming as to why these columns have not been filled up. The imperative provisions of the statute have not been complied with in this case. It is easy to see how this non-compliance with the provisions of the statute would necessarily prejudice the assessees. How can they under Rule 9 take objections to the revised assessment when they are not in a position to know the most necessary things for taking the objection, *viz.*, the amount of half-yearly assessment and the annual value of the land on which the assessment is based. Columns 16, 17 and 18 were at least filled up in March some time later. These columns 13 and 15 were never filled up at all. A violation of the express provision of the statute would necessarily render the proceedings invalid. Coming now to the second assessment book containing the entries, Exhibits B and C, relating to the other two houses of the appellant the "annual value" column, column 15, is filled up with the figures of Rs. 100 and 60, written in pencil. The same figures appear in ink under column 13 headed "Gross annual rental." It appears from the explanation written at page 37 of this book and the evidence that the figures under column 15 were copied in ink in column 13 to guard against possible alterations of the pencil entries in column 15. The

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Commissioners filled up this column, namely, column 15, which is a very important one from the standpoint of the assessee in pencil and the Manager reproduced these figures in ink in column 13. The unsatisfactory way how the revision work was carried on by the Commissioners is self-evident. But there is no explanation why the important column which would show the proposed assessment was not filled up at the time of the publication of the list or before the issue of the notice. In the case of this assessment book, it is clear that one of the imperative provisions of the statute has not been complied with. In my opinion, this omission to give the necessary information to the assessee in the assessment lists prepared by the Committee is by itself sufficient to render the revision proceedings invalid. The foregoing examination of the assessment lists shows that in their preparation the Committee members have not in some important particulars complied with the necessary statutory requirements. In *Baldwin* v. *Ellis* [1] it was held that the omission to state in the nomination paper the name of the parish for which the person nominated was qualified as a Local Government elector was a non-compliance with the requirements of Rule 4 of the Rural District Councillors Election Order of 1898. The following observations appearing in the judgment of Swift, J., in that case may usefully be referred to in this connection:—

"Mr. Pratt referred to this omission to state the parish of which the person nominated is a Local Government elector as being a mere technicality. I do not agree. A statement of these particulars is required by the Local Government Board's Order, and I cannot think that the omission to state those particulars on a nomination paper is a mere technicality, because unless the parish, for which the person nominated is qualified as a Local Government elector, is named no one could test whether or not he is qualified."

As pointed out in *Municipal Council, Cuddapah* v. *M. & S. M. Ry. Co., Ltd.*,[2] "Taxing enactments should be strictly construed and the right to tax should be clearly established. Conditions precedent to the imposition of any tax should be strictly complied with." In this case, as the condition precedent to the imposition of the revised assessment, *i.e.*, the revision of assessment list, has not been carried out strictly in accordance with the Act, the revision proceedings as well as the subsequent levy of the tax based on the revised assessment are both invalid.

It is also argued that the revision of the assessment is invalid as the notification calling for objections specified no date

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1. (1929) L.R. 1 K.B. 273: 98 L.J.K.B. 71.
2. (1929) I.L.R. 52 M. 779 at 785: 57 M.L.J. 471.

for hearing the objections as required by the statute. Rule 9 of Schedule IV makes it obligatory on the Chairman to notify a "specified date" for hearing objections, if any, to the revised assessment. In the notices in the present case it is true that a specific date for hearing objections has not been mentioned. What is mentioned is this: "Any objections to the above revision or suggestion will be considered if submitted within 6th February, 1928." The notice is dated 5th January, 1928. Strictly speaking, the mention of a specific date would seem to be necessary, as otherwise the objectors may not know on which date they have to be present to press their objections; but I am not quite sure if the omission to mention the specific date for hearing the objection is such a vital defect as will vitiate the entire proceedings relating to the revision assessment. If objection had been presented—in this case no objections were filed—the Chairman might have rectified the initial error by intimating to the objectors the time when their objections would be heard. Various cases in support of the appellant's contention were brought to my notice: *The Krishna Jute and Cotton Mills Co., Ltd., Ellore* v. *The Municipal Council, Vizianagram*,[3] *The Municipal Council, Rajahmundry* v. *Prasadarayudu*,[4] *The Municipal Council, Rajahmundry* v. *Rama Narasimha Rao*[5] and *The Queen* v. *Chorlton Union*,[6] etc. But I do not think it is necessary to discuss these cases or to express a definite opinion on this question as I have already held that the revision proceedings are clearly invalid for other reasons.

The next point for consideration is whether the enhancement of the property tax by the Municipality to 7½ per cent. from 1st April, 1928, is legal. It is argued that the rate is unenforceable as the notification levying the rate seeks to give retrospective effect to the decision of the Municipality to enhance the rate. It is not disputed that it is within the power of the Municipality to levy tax which it is competent to levy at a new rate, that is, that it has power to alter the existing rate by increasing it if it decides that such a step is necessary. In the present case, the Chairman proposed that the rate of property tax then in force be raised to 7½ per cent. The annual value of the land having been increased by the quinquennial revision, this meant a collection of house property tax at 7½ per cent. on the increased value. The objections to the quinquennial

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3. (1925) 49 M.L.J. 542.
4. (1926) 50 M.L.J. 556.
5. (1927) 109 I.C. 92.
6. (1872) L.R. 8 Q.B.C. 5.

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revision I have already dealt with. The present question relates solely to the enforceability of the decision of the Municipality increasing the rate so that if this decision is enforceable, the Municipality can collect house property tax at this new rate on the old annual value of the land, it having been now found that the quinquennial assessment proceedings are invalid. The proposal of the Chairman to increase the rate was accepted by the Council and the Municipality's decision to increase the house tax from the 1st of April, 1928, was notified on 5th February, 1928, and was also tomtomed in the village (*see* Exhibit F). As no objections were received, the Council confirmed the new rate in its resolution, Exhibit II-B, dated 17th March, 1928. This was published in the next issue of the District Gazette on 5th April, 1928 (*see* Exhibit H). This notification says, that the new rate of house tax of 7½ per cent. would come into effect from 1st April, 1928. It is now argued that since the Gazette announcing the levy of the increased rate is dated 5th April, 1928, and it makes the operation of the new rate to commence from the 1st of April, that is, from an anterior date, retrospective effect is sought to be given to the decision of the Municipality and, therefore, the new rate is unenforceable. This argument, in my opinion, is fallacious as it overlooks the significance of the proceedings prior to Exhibit H. It is not Exhibit H that levies the new rate. The levy of it was decided upon by the Municipality in its resolution, Exhibit II-B, dated 17th March, 1928, as already mentioned, that is, before the 1st of April, 1928, and before Exhibit H. This resolution was preceded by Exhibit F which states that, subject to objections, the new rate will be enforced from 1st April, 1928. It is not by the notification that the new rate was levied. The notification only serves to complete the decision of the Municipality by publishing it. In this connection it is important to notice that the signature of the Chairman in Exhibit H bears the date 19th March, 1928, that is, a date prior to 1st of April, 1928. The decision arrived long time before 1st April, 1928, could not be announced in the Gazette earlier as there was no Gazette before 5th April, 1928, the date of Exhibit H. In this view the argument of the appellant is clearly untenable. The appellant's argument also appears to be untenable having regard to the explanation of Rule 15 of Schedule IV. The explanation is as follows: "A general enhancement in the rate at which the tax is leviable is no amendment or revision within the meaning of this rule, and shall have effect from the date

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fixed for the enhancement." The date fixed for the enhancement according to the proceedings I have referred to is the 1st of April, 1928. It could not, therefore, be said that retrospective effect has been given to the decision of the Municipality to enhance the rate to 7½ per cent. For these reasons, I refuse to hold that the increased rate, that is, 7½ per cent. of the house property tax, cannot be enforced in this case. Of course, having regard to my decision that the revision proceedings are invalid, it follows that this rate can be levied only on the annual value of the land according to the old assessment.

The last question is whether this suit instituted against the Municipality is bad for want of two months' notice under S. 80 of the Code of Civil Procedure. That section states: "No suit shall be instituted against . . . a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been . . . delivered to him or left at his office, stating the cause of action . . . " To justify the contention that "notice of two months" is necessary, it must be shown that the Municipality is a "public officer" within the meaning of the term as used in S. 80 of the Code of Civil Procedure. According to S. 2, cl. (17) of the Code, "public officer" means a person falling under any of the descriptions contained in sub-clauses (*a*) to (*h*) of that clause. In support of his contention reliance is placed by the respondent's counsel alternatively on clauses (*f*) and (*g*). Sub-clause (*f*) is as follows:—

"Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience."

Having reference to this clause it is argued that the Municipality is (1) a *"person,"* (2) who is an *"officer of the Government,"* and (3) *"whose duty it is, as such officer . . . to protect the public health, safety or convenience."* Under the General Clauses Act (X of 1897) "a person" includes "any company or association or body of individuals, whether incorporated or not." Section 6, cls. (1) and (2) of the District Municipalities Act constitute the Municipal Council by the name of the Municipality as a body corporate with various rights. A Municipal Council, therefore, constituted under the District Municipalities Act can well come within the meaning of the term "person". A Cantonment Committee according to the rules under the Cantonment Act (XIII of 1889) was held to be a "person" in *Cecil Gray* v. *The Cantonment Committee of Poona.*[7] The main ques-

7. (1910) I.L.R. 34 B. 583.

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tion is whether the Municipality can be described to be "an officer of the Government", for it is conceded that if it can be held to be an "officer of the Government," the protection of the public health, safety and convenience, having regard to the provisions of Part IV of the Act falls within its duties. The Municipality is constituted by the Governor in Council (*see* S. 4). It can be abolished also by the Governor in Council. Its constitution is also determined by the Governor in Council and the same authority fixes the term of office of the Municipal Council (*see* S. 10). Under S. 33, the Municipality has to submit its administration report to the Governor in Council and the Governor in Council has power to suspend, generally stated, the action of the Municipality under S. 36 of the Act. It is argued that the Governor in Council means the Government and that when the Governor in Council can appoint, abolish and control the activities of a Municipality, the Municipality can well be described as an officer of the Government. Having regard to the definitions of the terms "Government" and "Local Government" in the General Clauses Act (*see* S. 2, cls. (21) and (29) of the General Clauses Act X of 1897), Ss. 46 and 134 of the Government of India Act and S. 31 of the General Clauses Act (X of 1897), the "Governor in Council" mentioned in S. 4, etc., of the District Municipalities Act is the "Government" mentioned in cl. (*f*) of S. 2, Civil Procedure Code. The point needs no elaboration as it is not disputed by the respondent. What is really disputed—and this I think is the substantial point for consideration—is whether the Municipality can be described as an officer of the Government within the meaning of cl. (*f*), for it is only then the duties of a public officer as required by the definition being complied with that it can be described as "a public officer" under S. 2, cl. (17), Civil Procedure Code. No decision under the Civil Procedure Code directly bearing on the point has been brought to my notice. But in my opinon the observations of the learned Judges in *President, District Board, South Kanara* v. *Gopalakrishna Bhatta*[8] refute completely the contentions of the respondent on this point. That was not a decision under S. 2, cl. (17), Civil Procedure Code. In that case it was held that the President of a District Board is not an officer of the Government within the meaning of cls. (1) and (3) of Sch. II of the Provincial Small Cause Courts Act (IX of 1887). The question arose in this way. A suit was brought against the President of the District Board of South Kanara for damages for an amount under

8. (1923) I.L.R. 46 M. 808: 45 M.L.J. 125.

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Rs. 500. To meet the argument that no second appeal lay against the decision of the lower appellate Court as the amount involved in the suit was below Rs. 500 reliance was placed by the appellant on Articles 1 and 3 of the Provincial Small Cause Courts Act which excepted from the cognizance of the Small Cause Court suits concerning acts or orders purporting to be done by the Governor-General in Council or by a Local Government or by a Member of the Council and suits concerning acts or orders purporting to be done by any other officer of the Government in his official capacity. It was argued that the President of a District Board is an officer of the Government within the meaning of these articles and the suit, therefore, is exempted from the jurisdiction of the Small Cause Court. This argument was not accepted by the learned Judges. This is how they dispose of the point:

"If the President of the District Board is an officer of the Government within the meaning of these articles, this suit would be excepted. But in our judgment he is not. Local Boards and Corporations are what may be called *quasi*-governing bodies, but by the very scheme of the Acts under which they are created they are not servants of the Government. Their representatives in some cases are nominated but generally elected by the people and they have their official capacity as such and not as officials of the Government. It is true that they are under Government in the sense that under the statute they have to account to the Government, and are under certain disciplinary powers of the Government. The Government has a duty cast upon it to see that these ministerial bodies carry out their functions lawfully. But in our judgment none of the officials of these Municipalities and District Boards are officers of the Government coming within Articles 1 and 3."

These observations may well be applied to the present case. It is true that the Municipality is constituted by the Governor in Council and that it can be abolished by the same authority. It is also true that the Governor in Council can control the activities of the Municipality in various ways; but it does not necessarily follow from these considerations that the Municipality is an officer of the Government. The District Municipalities Act does not constitute the Municipality a servant of the Government. The Act confers on the Municipality wide powers which are given to it to be exercised at its own discretion and without consulting the Government. The Municipality can acquire, hold and transfer property, moveable and immoveable, and enter into contracts. It can levy taxes to pro-

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vide funds to carry on its own administration and the Municipal Fund raised remains its own till it is abolished. Subject to certain restrictions, the Municipality can appoint its own servants; these are not Government servants, but are Municipal servants, *i.e.*, servants of the Municipality. Under these circumstances, I cannot agree with the contention that the Municipality constituted under the District Municipalities Act can be described as a "public officer" within the meaning of S. 80 of the Code of Civil Procedure. In this connection attention may be drawn to the observations of their Lordships of the Privy Council in *Metropolitan Meat Industry Board* v. *Sheedy*,[9] which dealt with the question whether a debt due to the Board constituted under the Meat Industry Act, 1915, No. 69 (N.S.W.) was a debt due to the Crown so as to enable the Board to claim priority in the liquidation of a debtor company. In deciding the point their Lordships had to consider the question whether the Board constituted under the Act of 1915 are "servants of the Crown to such an extent as to bring them within the principles of prerogative" according to which the Crown is entitled to payment in priority to all other unsecured creditors of the debtor company. The facts of the case necessary for our purpose are thus stated in the headnote:

"The Meat Industry Act, 1915, provided for the maintenance and control of slaughter-houses, cattle sale yards, and meat markets in Sydney and the adjoining district, and established the appellant Board to administer the Act. The members of the Board were to be appointed by the Governor, who had power to veto certain of its actions. The Board had wide powers, which it exercised at its discretion; any power of interference which a Minister of the Crown possessed was not such as to make the acts of administration his acts. Money received by the Board was not paid into the general funds of the State, but to its own fund."

In holding that the Board constituted under the Act of 1915 are not servants of the Crown, the learned Judges made the following observations:—

"They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the

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9. (1927) A.C. 899.

general revenue of the State, and the charges it levies go into its own fund."

Having regard to the powers given to the Municipality under the District Municipalities Act some of which I have referred to, I think similar observations may well be made in connection with the Municipality constituted under the District Municipalities Act. As in that case, so in this also, all the provisions dealing with the powers of the Governor in Council already referred to do not outweigh the fact that the District Municipalities Act confers on the Municipality wide powers which can be exercised at its own discretion and without consulting the Governor. For all these reasons, I would hold that the Municipality cannot be described as an officer of the Government under sub-clause (*f*), cl. (17) of S. 2, Civil Procedure Code.

Sub-clause (*g*) also of S. 2, cl. (17), which was somewhat faintly relied on by the respondent does not help his contention. Having regard to the powers and duties of the Municipality under the Act, it is obvious that it cannot be described as an officer doing the duties as mentioned in that sub-clause. Sections 117 to 124 of the Act (*i.e.*, general provisions relating to Taxation and Finance) do not show that the Municipality under the Act takes, receives, keeps or expends property on behalf of the Government. The point does not call for further consideration as it was not seriously elaborated by the respondent's learned counsel. It follows from what I have said that the argument that two months' notice should have been sent to the Municipality under S. 80, Civil Procedure Code, by the appellant before instituting the suit is untenable and must be overruled.

In the result the second appeal which is confined to the levy of enhanced rates on house tax alone is allowed partially and an injunction will be issued in favour of the appellant restraining the Municipality from collecting from the appellant house property tax on his two houses in the 2nd Ward on the basis of the revised annual value. The injunction was directed to these two houses as the annual value of the house in Ward No. 1 has not been increased under the revised assessment. The Municipality as a result of my decision will be entitled to collect from the appellant house property tax from these houses at the enhanced rate on the basis of the annual value under the old assessment. In other respects, the Lower Court's decree will stand. Each party will pay and receive proportionate costs in this Court.

S.R. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

Ekambara Mudali .. *Petitioner* in both (Accused).*

v.

Alamelammal and another .. *Respondents (Complainants).*

Ekambara Mudali *v.* Alamelammal.

Practice and procedure—Subordinate Criminal Court revising its own judgment—Legality of—President of a First Class Bench of Magistrates acquitting accused on default of complainant's appearance—Restoration to file of the complaint subsequently—Whether Court can act in revision on its own completed judgment.

The President of a First Class Bench of Magistrates acquitted an accused on default of the complainant's appearance on the date of the trial. Subsequently on the representation made by the complainant's counsel that there was a mistake as to the date of the trial and on the production of a sworn statement to that effect by the complainant, the case that was dismissed was restored to the file and the complaint was revived without a fresh stamped complaint. On the question whether the Court can act as a Court sitting in revision upon its own completed and pronounced judgment,

Held, that it must be taken as the processual law in this province that no Subordinate Court can sit in revision upon its own record and decide whether upon a certain view of the facts, its own proceedings should be treated as null. If it thought that a mistake had been committed, the matter must be referred to the High Court.

Achambit Mandal v. *Mahatab Singh,* (1914) I.L.R. 42 Cal. 365, referred to.

Narayanasami Aiyan v. *Janaki Ammal,* (1881) II Weir 308, distinguished.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the First Class Bench of Magistrates of Vellore, dated 22nd April, 1929, and passed in Summary Trials Nos. 233 and 234 of 1929.

A. Ramaswami Aiyar for petitioner in both.

P. Govinda Menon for respondents in both.

The Public Prosecutor on behalf of the Crown in both.

The Court delivered the following

JUDGMENT.—The petitioner has been sentenced to a fine of Rs. 15, in default two weeks' rigorous imprisonment, under S. 352, Indian Penal Code, in the following circumstances:—

The case was filed before the First Class Bench, Vellore, on 19th February, 1929, and posted to 26th February. On 26th February, according to the Diary Extract, it was adjourned to 1st March. On 1st March the complainant was absent, and

*Cr. R. Cases Nos. 571 and 572 of 1929. 27th March, 1930.
Cr. R. Ps. Nos. 519 and 520 of 1929.

Ekambara Mudali v. Alamelammal.

the accused, the present petitioner, was acquitted under S. 247, Criminal Procedure Code. On the 5th March the complainant's vakil represented that the posting to the 1st was a mistake for the 5th. Thereupon an entry was made in the diary for the 5th March:

"Alamelu Ammal prefers a complaint against Ekambara Mudali. Her sworn statement is recorded. The case is taken on file under S. 352, Indian Penal Code, and posted to 19th March, 1929."

This was merely a revival of the old complaint dismissed on 1st March, 1929. There was, as a matter of fact, no fresh stamped complaint and no sworn statement on 5th March. There was a complaint on plain paper, dated 5th March, and a sworn statement, dated 26th March.

The petitioner complains that having once been acquitted he cannot be retired for the same offence. The President thinks that his Court can act as a Court of Revision and decide which of its decisions may or may not be quashed. In any circumstances there is no legal authority for making false records in the Court's diary. If the President thought he could treat the order of acquittal as a nullity, he should have done so, proceeding with the case of 19th February on 5th March as though nothing had happened on 1st March. But such procedure is quite contrary to the Code, which has never contemplated a Court sitting in revision upon its own completed and pronounced judgments. The President, if he thought there had been a miscarriage of justice, should have referred the matter to the District Magistrate, who, if so advised, could have acted under S. 438.

A case very similar to the present case is considered in *Achambit Mandal* v. *Mahatab Singh*[1] and there it is held that the acquittal following upon a mistake about the posting date is a nullity, and the trial may proceed as if it had never been pronounced. This ruling is in terms based upon *H. C. Proceedings, 17th August,* 1875[2] but the Madras decision is no authority for the Court acting in revision of its own proceedings. A Third Class Magistrate posted a case to a certain date without informing the parties, and on their non-appearance, acquitted the accused. The District Magistrate ordered him to restore the case to file. The Sessions Judge questioned the legality of this order, and this Court, holding that the Third Class Magistrate's procedure was substantially irregular, set aside the order of acquittal. It did not

1. (1914) I.L.R. 42 C. 365. 2. II Weir 307.

Ekambara Mudali v. Alamelammal.

confine itself to returning the record with the observation that there was no cause for interference, which it would have done if it had held, as the Calcutta case assumes, that the Third Class Magistrate could himself restore the case. That the District Magistrate has no jurisdiction to order a retrial was ruled in the next case but one in Weir's Criminal Rulings, see *Narayanasami Aiyan* v. *Janaki Ammal*[3]. It must be taken as the processual law in this province that no Subordinate Court can sit in revision upon its own record, and decide whether upon a certain view of the facts, its proceedings should be treated as null. If it thought that a mistake has been committed, the matter must be referred to the High Court.

The petition is allowed; the sentence is cancelled; the fine is ordered to be refunded; and the President is enjoined that his diary must be a plain record of fact and not a pious adaptation to circumstances.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Selvam Chettiar .. *Petitioner* (Appellant—3rd Party)*

v.

Y. P. N. Venkatachalam Chettiar through his authorised agent M. Subramania Nadar and others .. *Respondents (Respondents—Petitioning Nos. 1 to 4, Creditors and Insolvents Nos. 2 to 4).*

Selvam Chettiar v. Venkatachalam Chettiar.

Provincial Insolvency Act (V of 1920), Ss. 37, 43 and 75—Annulment of adjudication—Modification of—"Person aggrieved"—Alienee from insolvent—Order under S. 37—Object of—Failure to apply for discharge in time—Effect of.

Section 37 is intended only to vest insolvent debtor's admitted properties in some third person for making them available to the creditors, avoiding in the meanwhile the debtor being called an insolvent. Where certain properties were alienated by the insolvent in favour of the petitioner and the alienation has not been found bad, an order vesting such properties in one of the creditors authorised to carry on the insolvency proceedings is one not contemplated by S. 37.

Such an alienee in so far as he is obliged, by this order, to defend his title is a "person aggrieved," entitled to appeal therefrom. A Court is not bound to annul the adjudication on the expiration of the time fixed to apply for a discharge.

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*C.R.P. No. 969 of 1928. 19th March, 1930.

3. (1881) II Weir 308.

Palani Goundan v. *The Official Receiver of Coimbatore*, (1929) I.L.R. 53 M. 288: 58 M.L.J. 369 (F.B.), referred to. Selvam Chettiar *v.* Venkatachalam Chettiar.

Petition under S. 75 of the Provincial Insolvency Act praying the High Court to revise the order of the District Court of Madura, dated 16th March, 1928, in C.M.A. No. 11 of 1928, preferred against the order of the Court of the Subordinate Judge of Dindigul, in M.P. No. 447 of 1927 in I.P. No. 1 of 1926.

T. L. Venkatarama Aiyar for petitioner.

K. V. Ramachandra Aiyar for respondents.

The Court delivered the following

JUDGMENT.—The facts of this Civil Revision Petition may shortly be stated. Certain persons were declared insolvents. They were adjudicated in 1926 on an application filed in 1925. M.P. No. 229 of 1926 was filed for the purpose of setting aside the alienation made by the insolvents in favour of Selvam Chettiar, who is the petitioner before me, under Ss. 53 and 54 of the Act. While the petition was pending, the period given to the insolvents for applying for an order of discharge expired and on the expiry of the period the Court passed *suo motu* an order annulling the adjudication. No notice was given either to the insolvents or to the creditors or to one of them specially authorised to conduct the proceedings in respect of the alienations. The particular creditor who was so authorised then filed an application for review of the order annulling adjudication. This is M.P. No. 447 of 1927 in I.P. No. 1 of 1926. On this petition the Subordinate Judge passed an order modifying the order of annulment and ordering that the right, title and interest of the insolvents in the properties in dispute in M.P. No. 229 of 1926 shall vest in the petitioner before the Subordinate Judge. The alienee filed an appeal before the District Judge. A preliminary objection was taken before the District Judge that he was not a party aggrieved by the order of the Subordinate Judge. The District Judge upheld the objection and observed:

"It is true that one consequence of the order of the learned Subordinate Judge will be that the appellant will have to defend M.P. No. 229 of 1926 on the file of the Sub-Court, Dindigul, but that is merely an incidental consequence."

The alienee files this revision petition before me against the order of the District Judge.

The first question is whether the appeal to the District Judge lay. I agree with the petitioner in thinking that the petitioner was a party aggrieved by the order of the Subordinate Judge. The whole object of the modification of the annul-

Selvam Chettiar v. Venkatachalam Chettiar.

ment of the adjudication and the specific terms of the order of the Subordinate Judge are all aimed at the petitioner. The District Judge concedes that one consequence of the order of the Subordinate Judge is that the petitioner will have to defend his title. It is difficult to say that this is merely an incidental consequence. The whole order of the Subordinate Judge was aimed at him and was intended to produce this particular result. I, therefore, think that the petitioner before me was a party aggrieved by the order of the Subordinate Judge and his appeal before the District Judge ought not to have been dismissed.

There is another part of the order which is complained of before me, namely, the order vesting the properties in dispute in M.P. No. 229 of 1926 in the creditor who is carrying on these proceedings. I do not think this is an order contemplated by S. 37. Section 37 was intended to vest the insolvent debtor's admitted properties in some third person for the purpose of making them available to the creditors while in the meanwhile avoiding the debtor being called an insolvent.

But in the present case until the alienation to the petitioner is found bad the properties belonged to the petitioner and nothing in S. 37 justifies an order vesting these properties in the creditor. The order, therefore, is irregular.

The only question that now arises before me is what order I should pass. One alternative is that I should set aside the order of the District Judge and of the Subordinate Judge and direct the review petition to be re-heard and disposed of according to law. But I think there is another alternative. The Subordinate Judge was certainly inclined to review the order of annulment, at any rate to the extent of permitting an enquiry into M.P. No. 229 of 1926. Apparently the District Judge also agrees with this. But both the Lower Courts—certainly the Subordinate Judge—felt compelled to pass the order which they have actually passed, because at that time the law was supposed to be that if an insolvent did not apply for discharge within the time prescribed, the adjudication ought to be automatically annulled. This matter has been the subject of consideration by a recent Full Bench decision reported in *Palani Goundan* v. *The Official Receiver of Coimbatore*[1]. There the Full Bench has held that a Court is not bound to annul the adjudication automatically and if there are circumstances justifying an extension of time for applying for discharge, it may be done. The effect of the law as laid down formerly, that is,

1. (1929) I.L.R. 53 M. 288: 58 M.L.J. 369 (F.B.).

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before the Full Bench decision, was that insolvents were deliberately avoiding to apply for discharge within the time prescribed, with the result that adjudications got annulled and fraudulent alienations became valid to the advantage of the alienees. The result of the Full Bench decision, however, is that it need not be. Whenever the effect of the insolvent's failure to apply for discharge within the time prescribed is to prevent any enquiry into an allegation of fraudulent conduct, the Court can take hold of the fact and extend the time for applying for discharge. In the present case the object of the Lower Courts was that M.P. No. 229 of 1926 should be heard and for that purpose and to that extent they are willing to review. I do not see why I should interfere with the discretion of the Lower Courts in permitting such review. The only thing I wish to say is that the order is not properly framed. I, therefore, substitute the following for the order passed by the Subordinate Judge:

"The order of annulment is set aside and the time for applying for discharge is extended up to such time as is necessary for disposing of M.P. No. 229 of 1926. M.P. No. 229 of 1926 will be inquired into and heard."

My object in passing this order is not to invalidate any enquiry into M.P. No. 229 of 1926 that has been made as a result of the order of the Subordinate Judge. I am told that some order has been passed on that miscellaneous petition and it is the subject of an appeal. Those proceedings will take their own course. An order will issue in the modified form. Cost of the appeal before the District Judge will abide the result. Each party will bear his own costs in this Civil Revision Petition.

S.R. *Order varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

Vellapalli Sekhara Menon .. *Petitioner**
(6th Respondent in L.P.A. No. 71 *of* 1924 *on the file of the High Court)*

v.

Karanath Kalathi Manakkal Narayanan *alias* Parameswaran Nambudri and others .. *Respondents*
(Appellant and Respondents Nos. 1, 4 *and* 5 *in do.)*

Sekhara Menon *v.* Narayanan

Civil Procedure Code (V of 1908), *O.* 22, *Rr.* 3 *and* 10—*Suit on behalf of Devaswom—Death of one of the trustees pending appeal—Legal representatives not impleaded—Abatement or devolution.*

In an action brought by several Uralars or trustees on behalf of a Devaswom, there is no abatement in the proper sense of the term on the death or removal of one of them. What takes place is devolution of office and the successor to the office *may* apply to be impleaded. But in order that a decree may bind a Devaswom it is not necessary to have all the trustees as parties provided that the litigation was conducted *bona fide* in the interests of the Devaswom by those Uralars who were parties to the suit.

Madhavan v. *Keshavan,* (1887) I.L.R. 11 Mad. 191; *Rangamma* v. *Narasimhacharyulu,* (1916) 31 M.L.J. 26; *Ratnam Pillai* v. *Nataraja Desikar,* (1923) 46 M.L.J. 341; *Sivakasi Viswanathaswami Devasthanam* v. *Koodalinga Nadan,* (1927) M.W.N. 743 and *Ittunan Panikkar* v. *Narayana Bharathikal,* (1928) M.W.N. 746, referred to.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to set aside the judgment and decree in L.P. Appeal No. 71 of 1924 preferred against the judgment and decree of the Honourable Mr. Justice Phillips, dated 23rd April, 1924, in Second Appeal No. 1449 of 1921 (A.S. No. 510 of 1920, District Court, South Malabar, O.S. No. 162 of 1919, Principal District Munsif's Court, Tirur) and to dismiss the said L.P. Appeal with costs.

P. Govinda Menon for petitioner.

T. R. Ramachandra Aiyar for respondents.

The Court made the following

ORDER.—This is a petition for review of judgment in a Letters Patent Appeal based on an alleged defect of procedure which occurred during the pendency of the appeal, which, it is said, invalidates the judgment.

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*C.M.P. No. 1622 of 1929. 6th March, 1930.

Sekhara Menon *v.* Narayanan

The suit was brought in 1919 to redeem a kanom on behalf of a Malabar devaswom by one out of the four Uralans, the other three being joined as 24th to 26th defendants. The other defendants were members of the tenant's tarwad of which the 1st defendant was the karnavan. The District Munsif gave a decree as prayed. The District Judge on appeal and Phillips, J., on second appeal held that the suit was barred by O. 9, R. 9, by reason of the dismissal of a former suit brought for the same relief and dismissed the suit. The plaintiff preferred a Letters Patent Appeal under cl. (15) of the Letters Patent and on 7th December, 1928, a Bench of this Court consisting of Devadoss and Waller, JJ., set aside the judgments of the first and second Appellate Courts and remanded the appeal to the District Judge to hear and determine it on the merits. We were informed at the hearing of this application that the District Judge has since heard the appeal and confirmed the decree awarded to the plaintiff by the District Munsif.

The petitioner is the 6th respondent in the Letters Patent Appeal, a junior member of the tenant's tarwad. He now objects that, on 21st May, 1928, *i.e.*, more than six months before the judgment, the 3rd respondent (24th defendant) had died, that the petitioner knew this only in January 28 (1929), that as the appellant took no steps to bring on record the legal representative of the deceased 3rd respondent, one of the four Uralans, without whom the appeal could not proceed, the appeal abated or became incompetent before the judgment, and that, therefore, the judgment in the appeal reversing the decisions of the lower Appellate Courts was wrong.

The petitioner's advocate argues that, as it is necessary in every suit brought on behalf of a devaswom to have all the Uralans as parties either as plaintiffs or as defendants, it follows that, on the death of one of them in a pending suit to which they have all been made parties, a necessary party is eliminated, and that, unless the legal representative of the deceased who was the next Uralan is added within the time allowed, the suit or appeal abates and its continuance becomes incompetent for want of necessary parties, that, thereafter, subject to the abatement being set aside, the only legal order possible is one of dismissal, and that, if a judgment on the merits is passed in ignorance of the death, such judgment is of no effect or validity. When the judgment was pronounced, no one was aware that the 3rd respondent had died. The question, in such circumstances, is not whether in the first instance all the Uralans or trustees should

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have been impleaded which had been done—but whether the death or removal of one of several trustees or Uralans who have been impleaded *ipso facto* makes the further progress and decision on the merits of the suit or appeal illegal till his successor has been impleaded. It is material that the objection is raised not by the devaswom or on its behalf by the Uralans but by its opponent who has been defeated on the merits.

No decision exactly applicable was cited. But reliance was placed on an unreported decision of Devadoss, J., in *Manikkal Sankaran* v. *Rama Variar*[1]. In that case, the death of one of the Uralans being known before judgment, an application to set aside the abatement and bring in the new Uralan had been made, but, however, was refused. Thereupon, the learned Judge, while also basing his judgment on the merits, held that the appeal could not proceed in the absence of all the Uralans. Whether that opinion was right or not, that is not the case here.

Similarly the case in *Arayil Kali Amma* v. *Sankaran Nambudripad*[2] was one in which the death of the co-Uralan was known before the judgment and apparently there was no petition to set aside the abatement or bring in his successor. The decisions in *Shanmuga Moopanar* v. *Subbayya Moopanar*[3] and *Kannan Kutty* v. *Velu*[4] are of no assistance to the petitioner.

There is authority for the proposition that, in order that a decree may bind a devaswom, it is not necessary to have all the trustees or Uralans as parties, provided that the litigation was conducted *bona fide* in the interests of the Devasthanam by those Uralans who were parties (*Madhavan* v. *Keshavan*[5]). The ground of this was explained and approved in *Rangamma* v. *Narasimhacharyulu*[6]. The principle governing the representation in suits of mutts, temples, etc., by Dharmakartas, Uralans or Matathipathis is illustrated by other decisions of this Court. In *Ratnam Pillai* v. *Nataraja Desikar*[7], Nataraja Desikar, who had no rights to a mutt, brought a suit on its behalf purporting to do so as head of the mutt. Pending the suit he was declared by the Privy Council not entitled to the headship. On the death of Nataraja Desikar, the person declared to be the rightful head applied to be impleaded and it was held that the case really fell under

1. S.A. No. 292 of 1921.
2. (1910) I.L.R. 34 M. 292: 20 M.L.J. 347.
3. (1921) 42 M.L.J. 133.
4. (1923) 46 M.L.J. 122.
5. (1887) I.L.R. 11 M. 191.
6. (1916) 31 M.L.J. 26 at 30.
7. (1923) 46 M.L.J. 341.

O. 22, R. 10, though the rule quoted was O. 22, R. 3, and that the applicant should be allowed to continue the suit. The principle is that on the death or removal of an Uralan impleaded as such in a suit, what takes place is devolution of the office and the person entitled to be impleaded in the suit is the successor to the office. This is not affected by the fact that the office is hereditary or belongs to a tarwad, which merely means that the office-holder must be sought among the heirs or in the tarwad of the deceased. That this is the correct view was indicated in *Sivakasi Viswanathaswami Devasthanam* v. *Koodalinga Nadan*[8]. There one of two trustees who were parties to an appeal on behalf of a Devasthanam had died and the other had resigned and his resignation had been accepted and two other persons had been appointed trustees by the Temple Committee but had not taken charge of their office. In this state of affairs, the appeal was heard and decided without bringing on record the new trustees. The contention raised in the High Court by the new trustees, that the decision in the Lower Appellate Court was incompetent, was negatived on the ground that the new trustees had not taken charge of their office on the date of the judgment in the Court below. But Srinivasa Aiyangar, J., also said that the case fell really under O. 22, R. 10, and that the policy of the Code is that, if the proceeding originally instituted is right and proper, any decision obtained therein is binding on all persons on whom the interest or right may devolve under that rule pending the disposal of the proceeding. Similarly in *Ittunan Panikkar* v. *Narayana Bharathikal*[9], which was a case of a mutt, it was held that a trustee, who files an action which is properly framed and constituted at the time of its institution, does not cease to be entitled to maintain and continue the suit merely because of his removal from office during the pendency of the suit. It was pointed out that the expression "by leave of the Court" in O. 22, R. 10, indicates that it was optional on the part of the assignee to apply and it is also in the discretion of the Court to allow him to do so or not. If this is so in the case of a plaintiff Uralan, it is *a fortiori* so in the case of a *pro forma* defendant like the deceased 3rd respondent, who by his written statement merely supported the plaintiff's claim and whose death at the time of the judgment was not known to any one.

In this view, the petition so far as it is based on the idea that there was any abatement in the proper sense of the term is misconceived.

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8. (1927) M.W.N. 743. 9. (1928) M.W.N. 746.

Sekhara Menon v. Narayanan.

In addition, we are satisfied that the devaswom was substantially and sufficiently represented in this Letters Patent Appeal even after the death of the 3rd respondent, and that the decision given after contest between the devaswom and the petitioner's tarwad is binding upon both and is not liable to be questioned for failure to implead the successor of 3rd respondent.

The petition is dismissed with costs.

S.R. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE CORNISH.

The Official Assignee of Madras .. *Appellant** (*Deft.*)

v.

T. Krishnaji Bhat, minor by his father and guardian, T. Sivasankara Bhat, since declared major, *vide* Order, dated 26th February, 1929, on C.M.P. No. 179 of 1929 .. *Respondent* (*Plff.*).

The Official Assignee of Madras v. Krishnaji Bhat.

Trust—Following trust property—Trust fund invested in business of trustee—Same permitted by terms of entrustment—Insolvency of trustee—Right of cestui que trust *to preferential claim over insolvent's assets—Indian Trusts Act* (*II of* 1882), *S.* 63.

The defendants, T. & Sons, who were a firm of jewellers, collected certain moneys on behalf of the plaintiff's father. The latter subsequently directed them to hold a portion of that amount on trust, the terms being that T. & Sons should invest the same at a certain rate of interest in their own firm or in any other firm as they might deem fit, the amount itself being payable to the plaintiff on his attaining 21 years. In pursuance of this, T. & Sons gave a receipt to the plaintiff's father for the money as fixed deposit in the name of his minor son. A few years later the plaintiff instituted a suit against T. & Sons alleging that they were in financial difficulties, that they were guilty of a breach of trust in regard to the investment of the trust fund and claimed a preferential right over the assets of the firm. T. & Sons having been adjudged insolvents subsequent to the filing of the plaint, the Official Assignee was impleaded as party defendant and the plaintiff's claim was gone into.

Held, the plaintiff was entitled, in respect of the trust fund, to a charge on the sale proceeds of the stock belonging to the firm in the hands of the Official Assignee.

The right of the beneficiary to follow trust money does not depend upon the act of the trustee being a wrongful one. Nor can it be said that the trust fund cannot be traced because of the inability on the part of the beneficiary to point to any particular stock as representing the original

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*O.S.A. No. 84 of 1926. 6th December, 1929.

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investment. Trust money invested in a business can be traced, within the meaning of S. 63 of the Trusts Act, to the eventual assets of the business.

Observations of Turner, L.J., in *Pennell* v. *Deffell,* (1853) 4 De G.M. & G. 372: 43 E.R. 551, relied on.

In re *Hallett's Estate. Knatchbull* v. *Hallett,* (1880) L.R. 13 Ch.D. 696 and *Official Assignee of Madras* v. *Devakottah Nagarathar Sri Minakshi Vidyasala Paripalana Sangam,* (1929) I.L.R. 52 Mad. 919: 57 M.L.J. 99, referred to.

Held, further, that in order that the doctrine of tracing might apply it is not necessary to show that money actually passed between the settlor and the trustee. It is sufficient to prove that as a result of the transaction between the parties the assets of the trustee were augmented.

In re *Hallett & Co.* Ex parte *Blane,* (1894) L.R. 2 Q.B. 237, distinguished.

Per *Cornish, J.*—There is nothing illegal in a settlor authorising, by the instrument of trust, the trustee to invest the trust money in a business, whether the trustee's own business or some other business, and providing that interest shall be paid for the use of the money so invested. The only effect of such an authority is to save the trustee from what would otherwise be a breach of trust.

Decision of Kumaraswami Sastri, J., affirmed.

Appeal against the decree and judgment of the Honourable Mr. Justice Kumaraswami Sastri, dated the 18th day of August, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 869 of 1923.

The facts are fully set out in the judgment of Reilly, J.

At the trial, before Kumaraswami Sastri, J., it was contended on behalf of the defendants that as Tawker & Sons were allowed to use the money there was no trust, that the trust was destroyed and that all that the plaintiff was entitled was to treat himself as a creditor of Tawker & Sons. It was also contended that as the money had been converted into goods and used in the firm there was no case made out for any following of trust money *in specie* or in particular goods. Reliance was placed among other cases on *Official Assignee of Madras* v. *Smith*[1] and *Official Assignee of Madras* v. *Krishnaswami Naidu*[2].

On the question whether the trust had ceased to exist the learned Trial Judge observed as follows in the course of his judgment:

"The provisions of the Trust Act are that, unless there is any provision to the contrary, a trustee cannot use the trust fund for his own purpose. But it is always open to the author of the trust to make a provision to the contrary and remove one of the disabilities of the trustee, a disability which prevents him from using the money for his own benefit. If the author of the trust deed agrees that the trustee can use the money for his own benefit there seems to me to be no reason for saying that the trust goes and that it cannot be trust property in any sense of the term because of this liberty given to the trustee. No authority has been

1. (1908) I.L.R. 32 M. 68.
2. (1909) I.L.R. 33 M. 154.

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cited for so broad a proposition and I am not prepared to hold that the mere fact that Tawker & Sons in this case had power to deal with the property for their own purpose, provided they paid interest, destroys the character of the trust fund in their hands. No doubt equities might arise in such cases which would prevent the *cestui que trust* and the author of the trust from following the trust property. But, as pointed out above, there is no equity in favour of third parties in this case and the sale proceeds are with Official Assignee."

On the main question whether the plaintiff was entitled to any preferential claim His Lordship discussed the evidence and concluded thus:

"On the evidence of Sivasankar Bhat, which I see no reason to disbelieve, it is clear that, acting on the permission of the author of the trust when the trust was created, Tawker & Sons, instead of keeping the trust funds separately invested or ear-marked, used it for the purpose of purchasing show-room goods. The goods were being sold, fresh goods were being bought and the plaintiff's money had been used for purchase and when the firm became insolvents the plaintiff was entitled to say that, as the trust money was used for the purchase of goods which went on being converted from time to time, he is, in the absence of the preferential rights, entitled to follow the goods in the show-room and to claim a charge upon those goods or their sale proceeds to the extent of the monies of the trust which have been utilised by Tawker & Sons who are admittedly trustees for the plaintiff. If any authority is needed for the proposition, I think it is found in the observations of Jessel, M.R., in In re *Hallett's Estate. Knatchbull* v. *Hallett*[3], where he describes various remedies where trust monies have been used by the trustee. The present case falls within the last of the cases stated by the Master of Rolls, namely, where his monies have been used for the purchase of goods and where the plaintiff cannot say *in specie* which particular goods were bought with his money, he has got a charge upon the property purchased if it is found that his monies were used along with other monies by the trustee."

In the end a decree was passed for Rs. 11,940 (Rs. 10,000 for principal and Rs. 1,940 for interest) with costs and interest at 6 per cent. per annum from the date of judgment till the date of payment. It was directed that the said sum should be paid to the plaintiff out of the sum of Rs. 22,000 with the Official Assignee which represented the sale proceeds of the show-room stock of Tawker & Sons.

Against this the Official Assignee preferred an appeal.

K. V. Krishnaswami Aiyar and *T. L. Venkatarama Aiyar* for appellant.

V. V. Srinivasa Aiyangar, C. Rangaswami Aiyangar and *S. Ramanatha Devay* for respondent.

The Court delivered the following

Reilly, J.

JUDGMENTS. *Reilly, J.*—In this case it is admitted that in August, 1919, Tawker & Sons, defendants 1 to 8, who were a firm of jewellers, collected Rs. 65,000 on behalf of the plaintiff's father, who is a nephew of defendant 1. It is also

3. (1880) L.R. 13 Ch.D. 696 at 709.

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admitted that in October, 1919, the plaintiff's father created a trust in respect of Rs. 10,000 out of that Rs. 65,000. The trustees were Tawker & Sons, defendants 1 to 8, and the beneficiary was the plaintiff, who was then a minor, aged 13. The obligations of the trust are set out in Ex. A, a letter from the plaintiff's father to defendant 1, in which he says:

"It is my request that you should invest in your firm Rs. 10,000 in the name of my minor son, T. S. Krishnaji Bhat, and pay him the interest accruing thereon;"

and after making reference to another matter he goes on,

"I shall not trouble you any more about these moneys and shall not question your investment of Rs. 10,000 either in your firm or any other as you may deem fit from time to time as you may deem proper. Until my said son becomes 21 years of age, you need not hand over the principal to him, only the interest you can be paying to my family."

A few days later Tawker & Sons gave a receipt to the plaintiff's father for this Rs. 10,000 as fixed deposit in the name of his minor son T. Krishnaji Bhat in accordance with the instructions contained in Ex. A, stating that the amount was to carry interest at 9 per cent. per annum.

In November, 1923, that is, four years later, the plaintiff instituted this suit against Tawker & Sons, alleging that they were then involved in financial difficulties and were likely to be adjudged insolvents and also that they had committed a breach of trust by not investing the Rs. 10,000 in accordance with the trust. He claimed a preferential right over the assets of Tawker & Sons to the extent of Rs. 10,000 and any interest that might be due upon it, and he prayed for the removal of Tawker & Sons from their office of trustees, for the appointment of a new trustee and for an order that Tawker & Sons should hand over the Rs. 10,000 to the new trustee or that it should be paid into Court out of their assets in preference to the claims of any other creditors.

Tawker & Sons in their written statement admitted the trust. They denied that the plaintiff had any right to question their investment of the Rs. 10,000; they denied that they had committed any breach of trust; they alleged that there had been over-payment of interest; and they maintained that the suit was premature.

Issues in the suit were framed in July, 1924. It must be noticed that at that stage the allegation of breach of trust was dropped, and there is nothing at all about it in the issues. At some time in 1925, while the suit was pending, Tawker & Sons were adjudged insolvents. The Official Assignee was then

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brought in as defendant 9, and in February, 1926, he filed a written statement, in which he put the plaintiff to the proof of the trust and denied that the plaintiff had any preferential claim over the assets of Tawker & Sons. But he did not ask for any additional issue to be framed.

At the trial the existence of the trust was admitted, though it is not clear exactly what admission was made in regard to the subject-matter of the trust. Kumaraswami Sastri, J., who tried the case, has made a statement in his judgment in regard to the course the arguments took, which Mr. Venkatarama Aiyar, who appeared for the Official Assignee at the trial and also appears in the appeal, has told us is not exactly correct. But there is no question now that the existence of some trust was not then denied by the Official Assignee, though, as will be seen, there is still some dispute as to what was the subject-matter of the trust. The main question which was dealt with at the trial was the question whether the plaintiff had a preferential claim over the assets of Tawker & Sons. Kumaraswami Sastri, J., came to the conclusion that the plaintiff had such a claim, and he made a decree against the Official Assignee for the payment of the Rs. 10,000 and interest into Court. He did not order the removal of Tawker & Sons as trustees, nor did he say anything about the appointment of a new trustee. But that is of no importance at the present moment, as we are informed that the plaintiff is already a major, more than 21 years of age. The Official Assignee appeals against that decree.

As I have said, at the trial the allegation of breach of trust was not urged. It had been dropped, so far as we can see, at a much earlier stage. But at a very late stage in the arguments before us it has been suggested that the breach of trust may be made out in this way. Tawker & Sons as trustees were under the duty of guarding the interests of the plaintiff in the most diligent way possible; they had the option of investing this money either in their own firm or in any other firm: when they found that their own firm was in difficulties it was their duty to exercise their option of putting the money in some safer business. But that contention was not raised at the trial; and there is no evidence on the record to show when Tawker & Sons began to be in financial difficulties, or how far those difficulties had gone at the date of the suit. In my opinion we cannot take up this question of breach of trust at this stage. We must treat the case, as it was treated at the trial, as one in which no breach of trust was seriously alleged and certainly no breach of trust was made out.

On that basis no wrongful disposal of the trust property has been shown; nor has any wrongful mixing of the trust property with other property of Tawker & Sons, such as would bring the case within S. 66 of the Indian Trusts Act, been suggested. That being so, can the plaintiff get a charge for this Rs. 10,000 on Tawker & Sons' assets? He can do so, if he can trace his trust property into the assets in the Official Assignee's hands within the meaning of S. 63 of the Trusts Act. It is admitted that the Official Assignee got into his hands a considerable quantity of jewellery, the stock-in-trade of Tawker & Sons, after their adjudication and that by selling a part of that stock he has realised Rs. 22,000, much more than is necessary to satisfy the plaintiff's claim. At the trial an attempt was made to trace the Rs. 10,000 with which we are concerned definitely to the jewellery which came into the Official Assignee's hands about six years after the creation of the trust. That obviously was a very difficult thing to do. It would require a chain of definite evidence to show that the jewellery which came into the Official Assignee's hands was actually bought with this Rs. 10,000 or with the proceeds of other jewellery, which in its turn was connected directly or indirectly by some chain of happenings with the Rs. 10,000. So far as the record shows, no attempt whatever was made to show anything more than the first step in such a chain, namely, that the Rs. 10,000 was used by Tawker & Sons for the purchase of some jewellery. What became of that jewellery, except that the evidence indicates that it was probably sold and the proceeds used again, there is nothing to show. And even in regard to this first purchase with the Rs. 10,000 the evidence, which is that of the plaintiff's father, appears to me vague, inadequate, flimsy and entirely insufficient to trace the Rs. 10,000 to the jewellery which actually came into the Official Assignee's hands. But it has been urged before us by Mr. Srinivasa Aiyangar, who appears for the plaintiff, that it is not necessary for him to show that this Rs. 10,000 became by a succession of happenings transformed into that particular jewellery which eventually came into the Official Assignee's hands, that it is enough for him to show that the Rs. 10,000 was invested in Tawker & Sons' business, which is admitted, and that from that alone he can trace the trust property to the assets of the firm, at the time of their insolvency. Is that admitted fact, the investment of the Rs. 10,000 in Tawker & Sons' business, sufficient for this purpose of tracing within the meaning of S. 63 of the Trusts Act? We must remember that this investment

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was permitted, and, indeed, intended, by the plaintiff's father when he created the trust. When he directed that the Rs. 10,000 was to be invested in Tawker & Sons' business, should they wish so to invest it, what could he have meant except that it was to become a part of the working capital of Tawker & Sons' business? If that were so, into what could it become transformed when used as working capital? It would be spent, we may suppose, on the purchase of stock or the payment of establishment or other running charges of the business or perhaps in clearing off debts and overdrafts. If that was done, what would represent the trust property now? I think it would be represented, as Mr. Srinivasa Aiyangar contended, by the stock-in-trade, the good-will of the business and the outstanding debts due to the business—in short by the assets of the firm.

Mr. Krishnaswami Aiyar, for the Official Assignee, has urged strongly before us that, if you are to trace and follow trust property within the meaning of S. 63 of the Trusts Act, you must be sure that there is a continuing identity from one transformation to another, there must be a traceable continuity. That is undoubtedly correct. You must be able to assure yourself with reasonable certainty that the trust property has been transformed by successive transactions into the substitute which the beneficiary claims or into something embracing it on which he is entitled to a charge. It does seem at first sight a rather long step to say that trust property invested in a business can by that fact be traced within the meaning of the section to the eventual assets of the business. But in *Pennell* v. *Deffell*[4] Turner, L.J., gave an instance of following trust property in this sense. His illustration was the case of an executor of a deceased partner leaving the deceased partner's capital with the surviving partners for them to trade with; and he pointed out that that would be trust money in the hands of the surviving partners and it might be followed, even though it started in the first instance when entrusted to them in the comparatively vague form of stock-in-trade and book debts, through all the fluctuations and ramifications of the business for a long period to its ultimate fruits, to which the beneficiaries would be entitled. That carries this principle of tracing or following trust property very far. Are we asked to go any further in this case? Mr. Krishnaswami Aiyar has suggested that the illustration put by Turner, L.J., is inapplicable to this case because the deceased partner had an interest in every item of the partnership assets, and he would distinguish the case put

4. (1853) 4 De G.M. & G. 372: 43 E.R. 551 at 553.

in the illustration from this case in that matter. But surely Turner, L.J., was not dealing with that aspect of the matter at all. If he had been, his illustration would have been entirely inapplicable to the case he was then discussing (*Pennell* v. *Deffell*[4]). He was stating generally the length to which the tracing of property was carried in Courts of Equity; and in my opinion that principle as illustrated by him on that occasion is sufficient to cover the tracing of the Rs. 10,000 originally invested in Tawker & Sons' business to the assets remaining in that business when they were adjudged insolvents. It makes no difference that their assets represented not only the Rs. 10,000 but something else also. That does not affect the question, as is shown by the second illustration to S. 63 of the Trusts Act.

But Mr. Krishnaswami Aiyar has raised several interesting and ingenious objections why this principle is not applicable to the present case. He has pointed out quite rightly that, when you are tracing trust property through a chain of transformations, if you reach a stage where the relationship of trustee and beneficiary no longer exists and in its place you find only the relationship of debtor and creditor, the chain breaks and tracing can go no farther. That is quite true. He urges that in this case the chain broke at the very outset, his contention being that, when the Rs. 10,000 was invested in Tawker & Sons' business, the relationship of debtor and creditor arose and superseded that of trustee and beneficiary. But I do not think that that correctly represents the position. Can we say in the words of Thesiger, L.J., in In re *Hallett's Estate*[3] that nothing remained "beyond the ordinary duty of a man to pay his debts"? What difference except in one respect, can we find between the relationship of Tawker & Sons to the plaintiff in regard to the Rs. 10,000 and the relationship of the surviving partners to the executor of the deceased partner in the illustration put by Turner, L.J., in *Pennell* v. *Deffell*[4]. There is one distinction. I have mentioned that Tawker & Sons were to pay to the plaintiff interest at 9 per cent. per annum on the Rs. 10,000. Is that a crucial distinction? We must remember that this is a very exceptional trust, in which the creator of the trust authorised the trustees to use the money, to invest the money, in their own business. If in exercising their option Tawker & Sons had invested it in some other firm and had

3. (1880) L.R. 13 Ch. D. 696.
4. (1853) 4 De G.M. & G. 372: 43 E.R. 551.

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collected 9 per cent. from those people and handed it over to the plaintiff, there would have been no question that their trusteeship would have continued. Does it make any real difference that by the special authorisation of the settlor they invested the money in their own business? As is well known, if the subject of a trust is a house, the trustee cannot take a lease of that house for himself. But, if it were permissible for him to do so, could you say that his position as lessee would in that case entirely supersede and wipe out his position as trustee? That is what is suggested in this case—that a relationship of debtor and creditor has arisen which has superseded, overwhelmed and obliterated Tawker & Sons' trusteeship. For myself, I do not see how that in the circumstances can have happened. And we must remember that it is admitted that they were trustees for the plaintiff in this matter and that their trusteeship in some sense persisted throughout.

Another objection is based upon the evidence that no money passed between the plaintiff's father and Tawker & Sons when this trust was created. D.W. 1, Tawker & Sons' clerk, says that this was a matter of book adjustment. On that remark Mr. Krishnaswami Aiyar bases the contention that tracing is in this case impossible under the decision in In re *Hallett and Company*: Ex parte *Blane*[5]. It is quite true that in this case Tawker & Sons, who held Rs. 10,000 of the plaintiff's father's money, did not pay that Rs. 10,000 into his hands, and he did not pay it back into their hands. But what happened in effect was that they held his Rs. 10,000 and he said "Please keep that Rs. 10,000 on behalf of my son and invest it in your business." The result of that was that, whereas before the transaction Tawker & Sons were liable to pay Rs. 10,000 to the plaintiff's father at any moment, after the transaction they held Rs. 10,000 which could not be claimed from them for eight years until the plaintiff became 21, and that Rs. 10,000 they could use in their own business. Is it not clear from that that Tawker & Sons' resources, their assets, were by that transaction augmented by the Rs. 10,000? That alone would take this case out of the ruling in In re *Hallett and Company*: Ex parte *Blane*.[5] I may mention here that Tawker & Sons' clerk, who has been examined as D.W. 1, gave some confused evidence about the disposal of the Rs. 65,000 collected by Tawker & Sons on behalf of the plaintiff's father. From one part of his evidence it appears that so much of that

5. (1894) L.R. 2 Q.B. 237.

Rs. 65,000 had been paid out by Tawker & Sons to different persons that less than Rs. 10,000 remained to be dealt with at the time the trust was created. But afterwards he contradicted himself. When we examine his evidence, what is it worth? He is not a man who could give any evidence about the matter of his own knowledge. It appears from the record that, when he was asked questions on this subject, he looked into some book which was in Court but which was not exhibited in evidence, and gave his replies from what he found in that book. I do not understand myself how that evidence was in any way admissible. It appears to me of no value whatever.

The last contention of Mr. Krishnaswami Aiyar is that the subject-matter of this trust was only a debt due from Tawker & Sons to the plaintiff's father. I have indicated already that I do not think on the facts that represents the position correctly. I may add that, if the plaintiff's father had merely transferred to Tawker & Sons the legal right to a debt due to him from Tawker & Sons, the debt would have been extinguished, and there would have been nothing on which the trust could operate. But obviously that is not a complete account of what happened.

In my opinion the plaintiff has sufficiently traced this trust property, the Rs. 10,000, to the assets of Tawker & Sons in the hands of the Official Assignee, and he is entitled to a charge on those assets. Though, with respect, I do not agree with all the steps by which Kumaraswami Sastri, J., reached his decision, I agree that his decision is correct. In my opinion, therefore, this appeal should be dismissed with costs.

Cornish, J.—I am of the same opinion. I think that the arrangement evidenced by Exs. A and B was a trust. It was common ground upon the pleadings of the plaintiff and defendants 1 to 8 that a trust was created by the plaintiff's father over a sum of Rs. 10,000 in the hands of the defendants and owing to the plaintiff's father for the benefit of the plaintiff and that the defendants accepted the trusteeship. The 9th defendant, the Official Assignee, by his written statement did not admit the fact or validity of the trust. But the only issue framed on this point was "What were the terms of the trust," which would seem to import that there was in fact a trust. No question was put to the plaintiff's witness, the plaintiff's father, contradicting or challenging either the fact or the validity of the trust. Indeed, he was only asked one question about the trust and that solitary question put to him in cross-examination was: "When was this trust created?"

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But it has been argued that, notwithstanding the intention of the parties to stand towards one another in the relationship of trustees and beneficiary, the arrangement whereby the trustees were to have the use of the trust money for investment in their business is so incompatible with the notion of a trust, that no trust can be inferred, and that the parties must be taken as standing in the relationship of debtors and creditor only in respect of the Rs. 10,000. No doubt it is a well-established principle that a trustee is to make no profit out of the trust fund, the reason for the rule being as stated in Lewin on Trusts, 13th Ed., p. 306, "to keep trustees in the straight line of their duty." It is equally a principle that, if a trustee trades with the trust money, he is accountable to the beneficiary for the profits. But it is open to a settlor when creating a trust to make it advantageous to the person appointed trustee to undertake the trusteeship, and to determine the purposes for which the trust fund shall be utilised, always provided that the purpose of the trust is not unlawful. There is nothing illegal in a settlor authorising by the instrument of trust the trustee to invest the trust money in a business, whether the trustee's own business or some other business, and providing that interest shall be paid for the use of the money so invested. The only effect of such an authority is to save the trustee from what would otherwise be a breach of trust. In my view, therefore, there is no ground for holding that the arrangement made by the plaintiff's father with defendants 1 to 8 is not capable of being treated as a trust.

Now the money being trust money, and if, as stated by the plaintiff's witness at the trial (in contradiction of the plaintiff's written statement in paragraph 7 of the plaint) it was invested in the defendants' firm, the plaintiff as beneficiary has a right to follow the money if he can trace it into the firm's assets now in the hands of the Official Assignee. Section 63 of the Indian Trusts Act gives him this right, and in my opinion it is unnecessary to look beyond this section. The relevant portion of S. 63 provides:

"Where the trustee has disposed of trust property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust property."

The two illustrations to the section describe the rights of a beneficiary where there has been a wrongful investment of the trust money by the trustee. But the right of the beneficiary to follow the trust money does not depend upon the act of the

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trustee being a wrongful one. This is clear from the principles stated by Sir George Jessel, M.R., in In re *Hallett's Estate*: *Knatchbull* v. *Hallett*[3], and which are embodied in S. 63. At page 708 of the judgment Sir George Jessel says:

"You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds."

The judgment proceeds to show that where property has been acquired by a trustee with money, partly trust money and partly the trustee's own money, the beneficiary can no longer elect to take the property, for the reason that it has been purchased with a mixed fund and not with the trust money purely and simply, and therefore the beneficiary is entitled to a charge upon the property for the amount of the trust money laid out in the purchase.

The evidence of the plaintiff's witness, who is the creator of the trust, is that this sum of Rs. 10,000 was in fact used by the defendants in the purchase of show-room stock. But his evidence is not very precise on this point, for in cross-examination he appears to admit that this was an assumption made by him from the fact that a few days after the receipt of this money certain show-room stock was purchased by the defendants. Besides, the witness appears to be speaking of a transaction which took place some time at the end of August or the beginning of September before he left the defendants' shop, where he was employed as manager and prior to the creation of the trust in October. It is certainly difficult to reconcile this evidence with the statement in his letter, Ex. A, written on the 5th of October in which he speaks of a sum of about Rs. 13,000 the balance of money remaining in the defendants' hands in respect of which he requests the investment of Rs. 10,000 in their firm for the benefit of his minor son, the plaintiff. But I do not think that the inability of the witness to identify any particular stock as purchased with the Rs. 10,000 affects the plaintiff's right to follow the trust money if it be established that the sum of Rs. 10,000 the subject of the trust was as a matter of fact invested in the defendants' business. The trust money, in my opinion, is traceable into the defendants' firm notwithstanding the plaintiff's inability at the time when the stock-in-trade of the firm became vested in the Official Assignee to point to any particular stock as representing

3. (1880) L.R. 13 Ch. D. 696.

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the original investment. I think this is clear from what was said by Turner, L.J., in *Pennell* v. *Deffell*[4]:

"It is, I apprehend, an undoubted principle of this Court, that as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

And after giving examples of this principle the Lord Justice added:

"But of course in those cases as in other cases the property which is the subject of the trust must in some manner be ascertained."

Reference may also be made to *Official Assignee of Madras* v. *Devakottah Nagarathar Sri Minakshi Vidyasala Paripalana Sangam*[6] where this doctrine was applied.

The learned Trial Judge accepted the evidence of the plaintiff's witness. I have already indicated that the witness's effort to identify particular show-room goods as the goods purchased with the Rs. 10,000 does not appear to me successful; but I see no reason to doubt that the transaction evidenced by Exs. A and B was a real and genuine transaction and that as a result of that arrangement the sum of Rs. 10,000 was in fact invested in the business of the defendants and utilised for the purposes of the business. No evidence has been called to disprove the investment of this money in the business, or to show that the stock which became vested in the Official Assignee on the firm's insolvency was in no wise, or could not be, the produce of the original investment of the Rs. 10,000.

In these circumstances, it seems to me that Kumaraswami Sastri, J., rightly held that the plaintiff was entitled to a charge on the sale proceeds of the stock realised by the Official Assignee, and I think that this appeal should be dismissed.

B.V.V. *Appeal dismissed.*

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4. (1853) 4 De G. M. & G. 372: 43 E.R. 551.
6. (1929) I.L.R. 52 M. 919: 57 M.L.J. 99.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—VISCOUNT SUMNER, LORD THANKERTON, SIR JOHN WALLIS, AND SIR LANCELOT SANDERSON.

Surendra Nath Karan Deo .. *Appellant**

v.

Kumar Kamakhya Narain Singh .. *Respondent.*

P. C.

Surendra Nath Karan Deo *v.* Kumar Kamakhya Narain Singh.

Civil Procedure Code (V of 1908), *S.* 11—*"Finally decided"*—Res judicata—*Suit for rent—Question of defendant's tenure not dealt with in final judgment of ultimate Court of Appeal—Chota Nagpore Tenancy Act,* 1908, *Ss.* 84, 87—*Presumption of correctness of entries made in record of rights—Onus of rebuttal on party impugning their correctness—Barsote Raj —Non-resumable Shikmi Taluk.*

In a suit for arrears of rent, the Court of first appeal referred in its judgment to the suit land as the defendant's *jagir,* but it also stated that the only point at issue was as to the rate of rent, and on second appeal the High Court dealt with the case in the same way.

Held, that in these circumstances, even assuming that the question of the defendant's tenure arose in the case, as the final judgment of the High Court, in second appeal, did not deal in any way with the question whether the defendant's tenure was a *jagir,* there was no final decision within the meaning of S. 11, Civil Procedure Code, 1908, of the issue whether the defendant's estate was a *jagir.*

An entry in a record of rights prepared by a Settlement Officer under the provisions of the Chota Nagpore Tenancy Act, 1908, may be rectified at the instance of the party aggrieved in a suit brought by him before a Revenue Officer within a period of three months (*see* section 87), but in the absence of such a suit, the entry in the *khewat* stands and cannot be altered by the Civil Court, and under section 84 (3) of the Act it is to be "evidence of the matter referred to in such entry and is to be presumed to be correct until it has been proved by evidence to be incorrect". These entries, being made after enquiry by experienced revenue officials, are statutory evidence of great weight, and the onus is on the party impugning their correctness to establish by cogent evidence that the entries are incorrect.

Held, that on the evidence in the present case, the onus had not been discharged.

The Barsote Raj is a non-resumable Shikmi or Shamilat Taluk, and is not a *jagir* tenure held under the Ramgarh Raj.

Judgment of the High Court reversed.

Appeal No. 89 of 1927 from a judgment and decree, dated the 11th March, 1926, of the High Court, Patna (Dawson Miller, C.J., and Mullick, J.), which reversed a judgment and decree, dated the 23rd March, 1922, of the Subordinate Judge of Hazaribagh.

The principal question for determination on the present appeal was whether Barsote Raj, which comprises more than 100 villages, is a Shikmi or Shamilat Taluk and non-resumable by the

*P.C. Appeal No. 89 of 1927. 29th November, 1929.
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respondent, the Raja of Ramgarh, or that it is a Jagir which the Raja of Ramgarh is entitled to resume on the failure of male heirs of the original grantee. The Subordinate Judge held in favour of the appellant that it was a non-resumable Shikmi Taluk, but the Appellate Court took the opposite view. Hence this appeal. The material facts of the case appear sufficiently fully from their Lordships' judgment.

The relevant sections of the Chota Nagpore Tenancy Act, 1908, to which reference is made in their Lordships' judgment, are:

Section 84.—(1) In any suit or other proceeding in which a record of rights prepared and published under this Chapter, or a duly certified copy thereof or extract therefrom, is produced, such record of rights shall be presumed to have been finally published, unless such publication is expressly denied; and a certificate, signed by the Revenue Officer, or by the Deputy Commissioner of any district in which the local area, estate, or tenure or part thereof to which the record of rights relates is wholly or partly situate, stating that the record of rights has been finally published under this Chapter, shall be conclusive evidence of such publication.

(2) The Local Government may, by notification, declare, with regard to any specified area, that a record of rights has been finally published for every village included in that area; and such notification shall be conclusive evidence of such publication.

(3) Every entry in a record of rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved, by evidence, to be incorrect.

Section 87.—(1) In proceedings under this Chapter, a suit may be instituted before a Revenue Officer at any time within three months from the date of the certificate of the final publication of the record of rights under sub-section (2) of section 83, for the decision of any dispute regarding any entry which a Revenue Officer has made in, or any omission which he has made from, the record, whether such dispute be . . . and the Revenue Officer shall hear and decide the dispute.

Section 92.—No suit shall be brought in any Court in respect of any order directing the preparation of a record of rights under this Chapter, or in respect of the framing, publication, signing or attestation of such a record or of any part of it.

Section 258.—Save as expressly provided in this Act, no suit shall be entertained in any Court to vary, modify or set aside, either directly or indirectly, any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under sections 29, 32, 35, 42, 46, sub-section (4), 49, 50, 54, 61, 63, 65, 73, 75, 85, 86, 87, 89, 90 or 91 (proviso) or under Chapters 13, 14, 15, 16 or 18, except upon the ground of fraud or want of jurisdiction.

De Gruyther, K.C. and *Dube* for appellant.

Upjohn, K.C., K. Brown and *L. P. E. Pugh* for respondent.

29th November, 1929. Their Lordships' judgment was delivered by

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SIR JOHN WALLIS.—This suit was instituted in 1919 by the Court of Wards on behalf of the plaintiff, the Raja of Ramgarh,

who was then a minor against the first defendant the Raja of Barsote, who was also a minor and others claiming under him for a declaration that his tenure "ordinarily known as the Barsote Lat" is not a *shamilat* or *shikmi taluk* of the Ramgarh estate nor is it non-resumable as recorded in the *khewat* forming part of the record of rights prepared by the Settlement Officer under the provisions of the Chota Nagpore Tenancy Act, 1908, and for a further declaration that it is an ordinary *jagir* under the Ramgarh Raj and is resumable on failure of the direct male line of Raja Pirthi Karan, an ancestor of the first defendant, who, according to the plaint, was the original grantee.

The record of rights was drawn up in 1914, and it was open to the plaintiff under S. 87 of the Act to file a suit before a Revenue Officer within three months to rectify the entry in the *khewat*. This not having been done, the entry stands and cannot be altered by the Civil Court, and under S. 84 (3) it is to be "evidence of the matter referred to in such entry and is to be presumed to be correct until it has been proved by evidence to be incorrect."

It seems desirable to set out at once the case which the plaintiff came into Court to prove as set out in paragraphs 5 to 8 of the plaint.

"It was customary with the proprietors of the Ramgarh estate to grant lands and villages in Jagir to their retainers and well-wishers on condition of rendering various services or for maintaining them sometimes paying small rent for them and sometimes paying no rent. These grants originally used to be simply tenancies at will or at most life-grants being resumable on the death of the grantee. Eventually they became heritable, being resumable on the failure of the direct male line of the grantee and also on other contingencies.

Sanads and *Amalnamas* used to be issued to the parties concerned and *Kabuliyats* used to be taken from the grantees or from the subsequent holders.

"Lat Barsote originally consisted of villages, the names of which are given in schedule 'B' annexed hereto and within the ambits of these villages new villages have sprung up and come into existence and the said Barsote Lat now consists of villages mentioned in schedule 'A'.

The said Barsote Lat was given in *Jagir* by a remote ancestor of the plaintiff to Pirthi Karan, who assumed the title of Raja, and who was a remote ancestor of the defendant No. 1, but the Sanad under which the grant was made is not forthcoming and the earliest document that is in existence is the *Jamabandi* paper of the year 1813, *Sambat* showing *Debo* to be a rent-paying tenure. The subsequent *Jamabandis* also show the same.

"Jaimangal Karan Deo, who also assumed the title of Raja, was an ancestor of defendant No. 1 and holder of Lat Barsote. The said Raja Jaimangal Karan Deo executed a *kabuliyat* in favour of Maharaja Sidh

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Nath Singh, an ancestor of the plaintiff in 1870, *Sambat,* in respect of Lat Barsote agreeing to pay an annual rent of Rs. 281-8-6 *sicca* which comes to Rs. 300-4-9. The genealogical table mentioned in schedules C and D respectively show the connection of the said Raja Pirthi Karan with the defendant No. 1 and that of Maharaja Pareshnath Singh with the plaintiff."

It is also alleged in the plaint that the entry in the *khewat* throws a cloud on the title of the plaintiff and hence the necessity of the present suit; and it may readily be understood that apart from the possibly remote contingency of a failure of male heirs on the part of the first defendant's family it is in the plaintiff's interest to establish if he can that the Barsote estate is a portion of the Ramgarh estate granted in *jagir* to the defendant's ancestor.

The case presented in the written statements is that the allegations in the plaint are a travesty of the facts. The first defendant's estate was never known as the "Barsote Lat" but as the "Barsote Raj" and had descended in his family for more than fifty generations. It was not granted by a remote ancestor of the plaintiff to Pirthi Karan. It was never held as a *jagir* under the Ramgarh Raj, but "for convenience of realization Government dues payable for the Barsote estate were paid through the proprietor of the Ramgarh estate like other similar *shamilat taluks* in the district from about the Permanent Settlement," that is from about 1793.

The Additional Subordinate Judge of Hazaribagh dismissed the plaintiff's suit, but his judgment was reversed on appeal by the High Court at Patna which gave the plaintiff a decree. As will be seen the judgments of the learned Judges, Dawson Miller, C.J., and Mullick, J., are not based on direct evidence as to the grant of a *jagir,* but on inferences and presumptions which have to be carefully examined.

In the first place it seems desirable to state that the defendant's estate has never been ordinarily known as the Barsote Lat nor have the defendant and his predecessors ever been known as the holders of a *jagir* in the Ramgarh estate. They have always been known and addressed in official correspondence as Rajahs or *Zemindars* (that is to say proprietors) of the *Pergana* of Barsote, and their estate has been referred to as their *zemindari* or property, which is in entire accordance with the statement in the record of rights, that it is a *shamilat taluk,* that is to say an estate distinct from the Ramgarh estate though included at the Decennial Settlement of 1790, made permanent in 1793, in the *zemindari* of the Rajah of Ramgarh with whom the settlement was effected. The term *shikmi taluk* has the

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same meaning, the word *shikmi,* or belly, being applied to taluks which were once independent but are now inside another estate.

It will, in their Lordships' opinion, throw much light upon the case to trace in the next place how the present dispute would appear to have arisen. Both these estates are situated in Chota Nagpore, which in the 18th century was a wild and thinly populated hill country to the south-west of Berar and was under the government of the Nawab of Bengal, until it came under British rule in consequence of the grant of the *diwani* in 1765. After a rebellion in 1831 it was placed in charge of an officer, styled the Agent to the Governor-General for the South Western Province; and on the 22nd November, 1839, the Agent called upon the *zemindars* to procure a return for all the *elakadars* or holders of tenures under them, and themselves to submit a consolidated return. The return submitted by the *elakadars* was to show "the amount of land revenue of each *mauza* (village) paid by the *zemindars* to Government, and the *jama* thereof realized from the tenants through the *elakadars,* with a description as to how, or under what conditions and since what date, the land *jagirdari, ghatwari* or *zemindari,* as the case may be, has been in possession of the *elakadars.*" This shows that the *elakadars* in the *zemindari* might be either *jagirdars,* holders of Ghatwal tenures or *zemindars,* that is to say, proprietors; and emphasises the importance of the fact already mentioned that the defendant's predecessors were always known as Rajahs or *Zemindars* of the Pergana of Barsote.

There was delay in the submission of these returns and their Lordships observe that a letter written by the Rajah of Ramgarh, Ex. 39 of the 14th June, 1842, excusing the delay, contains the following sentence:—"Some *jagirdars* and the Rajas of Barsote, Isutkhori and Barmaria, etc., have not submitted the statement in spite of demands made on them." This makes a clear distinction between the *jagirdars* in the *zemindari* and these Rajahs, though they are all included in the appended list [Ex. 39 (*a*)] headed "List of defaulting *jagirdars.*"

What next followed is of great importance in their Lordships' opinion for a due understanding of the case. There is evidence that the defendant's predecessors had always objected to being included in the Ramgarh *zemindari,* and the Rajah appears to have thought that this was a good opportunity of asserting his independence and claiming to pay revenue direct

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to Government. Accordingly, on the 29th July, 1843, he presented in person the return called for together with a *patta* or copy of a *patta* bearing date the 5th August, 1776, and both documents were then signed by Major J. Simpson, the Assistant, who was then in charge of the Hazaribagh district. The *patta* has been exhibited by the defendants as Ex. U in this case, and has assumed more importance in the arguments before their Lordships than in the Courts below, as will be seen later. The return gives the required particulars of the names and collections of 133 villages, some of them described as uninhabited, meaning deserted by the inhabitants, as was too often the case in those days. Their Lordships see no reason to doubt that this was a genuine return of the villages which had been in the Rajah's possession.

In the column headed "Remarks" the Rajah stated that these *mauzas* had been in his ancestor's proprietary possession for more than 52 generations and that the plaintiff's ancestor, Dalel Singh (who died in 1724), had deprived his ancestor of the Pergana of Rampur and of some villages in the Pergana of Barsote and alleged that in 1776 Mr. Grant Heatley, when he came to make a settlement, finding that the villages in his possession formed part of the old *zemindari* of the family, allowed them to remain under Government collection, and granted his ancestor a *patta* signed by Maharaja Paras Nath Singh, the ancestor of the plaintiff, at a fixed rent of Rs. 151. He stated that he had wrongfully been made to pay the revenue to the Rajah of Ramgarh and relied on the fact that the villages which had remained in his possession had not been entered in the *sarsikan* accounts of the Ramgarh estate to show that the settlement of these villages had not been made with the Ramgarh *zemindar*. The observations concluded with a petition that the Government revenue entered in the *patta* granted by Mr. Heatley, *viz.*, Rs. 151, might be received by the Government.

This return no doubt ignores the fact that the Barsote estate had been included in the permanent settlement made with the Rajah of Ramgarh and that the defendant's ancestors had been paying the annual Rs. 282-8-4 since 1813 as proved, and presumably since 1790 also; but the statement that Barsote villages, 34 in number, which are now shown in the Ramgarh accounts as forming part of the Ramgarh estate, and the Pergana of Rampur once belonged to Barsote is confirmed by Ex. W.W., a register relating to the Pergana of Ramgarh, 1760—1790, produced from the Collectorate, which shows that,

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long after 1724, these villages continued to be registered in the name of the defendant's ancestor.

Ex. A, a statement of gross produce and *sadar jama* of villages in Raj Ramgarh, according to *sarsikan* for 1793-4, contains entries relating to these 34 villages only in the Pergana of Barsote, and says nothing about the defendant's 112 or more villages. As regards these earlier *sarsikan* accounts to which the Rajah appealed, it is fairly clear that, if his villages were included in the Ramgarh *zemindari* otherwise than as a *shamilat taluk,* they should have appeared in these accounts. The other side were quite alive to this difficulty in the way of their contention that the defendant's estate was only a Ramgarh *jagir,* and to get over it, entered the defendant's estate in their 1843 return as one *mauza* or village, making up with 33 other villages mentioned, the 34 villages owned by Ramgarh in the Pergana of Barsote. It was entered as held by the defendant's predecessor as a *jagir* at a permanent rent of Rs. 281-8-9, and described as consisting of one *mauza* or village bearing the name of Lot Debang, and as having an approximate area of 60,000 (*bighas* or acres) and yielding an annual *jama* to the *elakadar* of Rs. 2,000. Obviously, as the Subordinate Judge has pointed out, there never could have been one *mauza* or village of this size, including the defendant's 112 or more villages. This, however, is the unsubstantial foundation on which the plaintiff's case rests.

In the later 1859 return the *jagir* is *entered* as Lot Debo instead of Lot Debang; in the plaint in the present suit it is stated quite untruly that the defendant's estate was ordinarily known as the Barsote Lat, and it is so described in the appellate decree.

It will be convenient at once to call attention to the worthless character of the earlier evidence adduced in support of this description. The village of Debo was one of the 34 villages included in the Ramgarh accounts of 1793-4 (Ex. A), with a gross produce of Rs. 3.2 and a *sadar jama* of Rs. 5. Exs. 21 to 21 (*b*), described as *jamabandi awarya* of Barsote for 1756, 1761 and 1778, show a Barsote village Debo, as held by the defendant's ancestor Pirthi Karan Raja. ["Previous *patta* Rs. 3, Present *patta* Rs. 2," "Amount" Rs. 40 in Ex. 21 (*a*) and Rs. 50 in Ex. 21 (*b*).] These entries presumably refer to the village of Debo, which was one of the 34 Barsote villages which, since the beginning of the 18th century, had been incorporated in the Ramgarh estate, and have nothing to do with

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the 112 villages forming the defendant's estate which are the subject of this suit.

On the other hand, the entries in Exs. 21 (*c*) and 21 (*d*) for 1781 and 1785 may relate to the suit villages. Ex. 21 (*c*) shows Rajah Pirthi Karan as liable to pay monthly Rs. 21.1; that is Rs. 240-12 annually and Ex. 21 (*d*) Rs. 261. The entry in Ex. 21 (*c*) appears under the heading *Jagirdari*, and the entry under Ex. 21 (*d*) does not. This is all the evidence of the early accounts prior to the Permanent Settlement, and it does not support the case that the defendant's predecessors held a *jagir* known as Lat Debang or Lat Debo under the Ramgarh Rajah. Moreover, such entries would be of little or no weight unless it appeared that the defendant's predecessors were aware of the way in which the Ramgarh accounts were kept.

It really comes to this, that in 1843 there was a dispute between the two Rajahs, one endeavouring to go behind the terms of the Permanent Settlement and establish his complete independence of the Ramgarh *zemindari* and to reduce the rent payable by him to Rs. 151, and the other seeking, possibly as counter-move, to establish that, far from being independent, Barsote was only held as a *jagir* known as Lat Debang or Debo in his own Pergana of Barsote. In their Lordships' opinion, the plaintiff has failed to prove that there ever was a *jagir* known as Lat Debo.

To resume the narrative of events, the dispute as to the rate of fixed rent came to a head in 1858 when Ramgarh sued Barsote for arrears. In his plaint, as appears from the judgment of the Deputy Commissioner, he made the not very relevant allegation that *mauzas* of Pergana Barsote constituting (or forming part of) the *zemindari* of his ancestors, were given to the plaintiff's ancestors as a *mashruti jagir* on payment of rent, and alleged that he had been realising rent at the rate of Rs. 281-8-3. The defendant, on the other hand, denied that there was any *mashruti jagir,* and pleaded that the villages of the Pergana Barsote were in possession of his ancestors from before the time of British rule, and further alleged that on coming to make a settlement of Ramgarh Mr. Leslie granted a *patta* signed by himself and by Rajah Paras Nath Singh, the ancestor of the plaintiff, fixing the annual rent at Rs. 151 *sicca,* and that the defendant refused to accept rent at that rate. This was a repetition on both sides of the case set up in 1843.

Before the suit came on for hearing the Government in 1859 called upon the Ramgarh *zemindari* to make a return of

title-holders in his *zemindari* for the purpose of the warrant of precedence stating the origin of the title. The Ramgarh *zemindar* gravely returned that the title of Raja had been conferred on the ancestor of the Barsote Rajah by his own ancestor Dalel Singh when his brother married into the Barsote family. He did not fail to add that Barsote was his own *jagirdar*. This choice of Dalel Singh as the alleged fountain of honour was not a very happy one, as it was Dalel Singh, as has been seen, who wrested from the then Rajah of Barsote 34 villages of the Pergana of Barsote and another *pergana* as well.

The Deputy Commissioner of Hazaribagh, who was the same Major Simpson who had received and affixed his signature to the return and *patta* presented by the Barsote Raja in 1843, gave judgment in the rent suit in June, 1861, and the case went on appeal to the Judicial Commissioner and on special or second appeal to the High Court at Calcutta.

It will be convenient to deal here with the contention raised both here and below, and upheld by the learned Chief Justice, that these judgments make the issue as to the question of *jagir res judicata* in favour of the plaintiff. With reference to the *patta*, the Deputy Commissioner observed:

"It appears that the *patta*, dated the 5th Bhado Bali Sambat, 1833, signed by the Collector of Ramgarh on the 5th August, 1776, which has been filed by the defendant, relates to the period prior to the decennial settlement, and that there is no mention in the *Istamrari mokurrari* that the same *jama* would stand for ever."

The Deputy Commissioner then dealt with the receipts filed for the defendant, some for part payments and none showing an acceptance of Rs. 151 in full satisfaction and he passed a decree for arrears at a rent of Rs. 300-4-9 as claimed in the plaint. On appeal the Judicial Commissioner observed that the defendant had filed a copy of the *patta*, but that it did not bear the signature of anyone and that it related to a period prior to the decennial settlement and that there was no evidence that the same *jama* was allowed to stand at the decennial settlement. In the result he dismissed the appeal. The case then came on special (or second) appeal before a Bench of the Calcutta High Court who delivered the following judgment:

"The plaintiff proved that he had realized rents at the rate claimed down to the year 1900 S. That threw the onus on the defendant of showing that he was liable for a less amount only. The defendant for that purpose put in the copy of a *patta* and receipts which the judges assigned satisfactory reasons for rejecting as not genuine. The appeal is, therefore, dismissed with costs."

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As regards the question of *res judicata* the final judgment of the High Court does not deal in any way with the question whether the defendant's tenure was a *jagir* nor does the judgment of the Deputy Commissioner at the trial. On appeal the Judicial Commissioner no doubt referred at the beginning of his judgment to the suit land as the defendant's *jagir*, but he also stated that the only point at issue was as to the rate of rent, and the High Court dealt with the case in the same way. In these circumstances it appears to their Lordships that there was no final decision within the meaning of section 11 of the Code of Civil Procedure of the issue whether the defendant's estate was a *jagir*, if indeed it can be said to have arisen in the case.

Their Lordships will now resume the narrative of events which led up to the litigation. There were subsequent rent suits in which the question of the *jagir* tenure was left open. In 1876 the Commissioner of Chota Nagpur made a report to the Government of Bengal on the land tenures of Hazaribagh (Ex. M.) which contains the following passage:—

"Samilat or Shikmi Talooks. In paragraph 5 I have mentioned that Pargana Chai was composed of five petty Rajas. The Rajas were semi-independent, only paying tribute to Raja Lal Khan, and when merged into Ramgura continuing to pay tribute to the Ramgurh Raja. When the country was taken by the English and its settlement was being made, these Rajas endeavoured to get settlements made with them direct, but their efforts and through (?) they were maintained each in her *raj*, they were directed to pay their tribute and was then failed converted into a fixed rental of Ramgurh. The Raja of Rampoor Jagodih Paroria and Itkhori accepted these terms, and have been made Shikmi Talookdars. The Raja of Pitij, who was a resident of Gaya, refused to agree and made over his Talook to the Raja of Kendi into whose estate this Talook has merged, and the title has been lost. Similarly, the Raja of Barsote succeeded in saving his estate from being merged into that of Ramgurh, and the estate was made Shamilat Talook as also was Pargana Koderma; but the circumstances relating to this last, its severance from the Ramgurh Estate, etc., are related in a separate chapter. There is a lenged (?) that there were two more such Sikhmi Talook, viz., (*s*) Tilaiya and Gola, but they have long been extinct and have merged into the Ramgurh estate."

There are obvious misprints in this printed copy, but it appears to mean that, in the Commissioner's opinion, what happened was that when the country was taken by the British and its settlement was being made, which would be about 1776, the date of the *patta* (Ex. U.), Barsote and two other small Rajahs were ordered to pay their tribute or land-revenue to Ramgarh, and that this made them *shamilat taluks*. That is in effect the case presented to their Lordships by the appellant, with this addition, that before the date of the Permanent Settlement the amount of the tribute or land revenue payable by

Barsote was raised from 151 to 282 sicca-rupees, or Rs. 300-4-9 in the Company's coin, which is now the amount of the fixed rent payable by Barsote to Ramgarh.

The preparation of the record of rights under the Act of 1908 and the entry which gave rise to the present suit have already been mentioned, but it appears desirable at this stage to set out the Settlement Officer's reasons for making the disputed entry as contained in his order of the 1st February, 1914.

"After reading the evidence produced I am satisfied that these tenures are not of the same origin as the Jagirs founded by the Padma (Ramgarh) Raja and his predecessors. They have hitherto been regarded and treated as shikmi or shamilat taluks and they probably existed as independent properties before the Ramgarh Raj was established, and I can find nothing in these recent history to change the status of the holders of these *taluks*.

As they were not originated by the Ramgarh Raj, I find them to be not resumable by the *zamindar*. They will be noted in the *khewat* as "not liable to resumption."

The entry in the record of rights being evidence by statute and the onus being on the plaintiff to prove by evidence that it is incorrect, the question is has the plaintiff discharged the onus? After a careful consideration of the evidence and the arguments submitted by counsel their Lordships agree with the Subordinate Judge that he has entirely failed to do so.

In coming to an opposite conclusion the learned Chief Justice accepted the entries in the plaintiff's accounts which their Lordships have already given reasons for disregarding, and also attached great importance to the *kabuliyat* executed by the defendant's predecessor in 1813:—

"To

Sri Sidh Nath Singh Bahadur.

I am Raja Jai Mangal Karandeo of Barsot Khas District Ramgarh. I owe Rs. 281-8-6 in Kaldar (milled edge) coin on account of rent of the villages to the landlord for 1869 and so I execute this *kabuliyat* at Kachahri and do declare that I shall pay off the same according to my promise made herein without any objection.

Details of instalments:—

	Rs.	A.	P.		Rs.	A.	P.
Asin	35	0	0	Magh	26	8	0
Katik	35	0	0	Phagun	26	8	0
Aghan	70	4	0	Chait	9	0	0
Pus	70	4	0	Baisakh	9	0	0

Should I default payment of any instalment, I shall pay interest thereon as prescribed by law, and should I fail to pay the rent I shall be deprived of my land. Dated the 1st Asarh Sudi, Sambat, 1870, at Ichak Kachahri.

Baksi Debi Das.

Executed the *kabuliyat*. Raja Sri Jai Mangal Karandeo. By the pen of Kuer Kani Nath Karandeo."

(Signature mark.)

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This document the learned Chief Justice regarded as an admission of proprietary rights in the Ramgarh *zemindar,* and he drew the inference that the defendant was a *jagirdar,* that being the highest tenure on the estate. Their Lordships are unable to agree with either of these conclusions. The *kabuliyat* in question had done duty in the previous rent suits, and has been accepted in the Courts below. It contains particulars of the amount of rent due for *fasli* 1869 and details of the instalments. These are matters as to which, then as now, both the Ramgarh *zemindar* and the owner of the Barsote on the one hand, and the tenants cultivating under them on the other, were required annually to exchange *pattas* and *kabuliyats.* The stipulation that overdue instalments should bear interest is quite usual, and it would not be surprising or unprecedented that the landlords should have endeavoured to strengthen their position by inserting an acknowledgment of liability to eviction for non-payment of rent, more especially seeing that, as Mr. de Gruyther has pointed out, while the Government were armed with drastic powers for the recovery of their revenue from the *zemindars,* the *zemindars* and under-proprietors had at this time no summary powers of recovering rent from the cultivating tenants and had only the remedy of a civil suit. This was probably the common form of *patta* and *kabuliyat* in use at this time, and was used in this instance for an agreement as to the payment of arrears for the preceding *fasli,* as it was executed in 1870 in respect of rent which accrued in 1869. Be this as it may, the fact that in one single instance the Ramgarh *zemindar* succeeded in getting the Barsote Rajah to affix his signature to such a document is, in their Lordships' opinion, altogether insufficient to warrant a finding that the entry in the record of rights as to his proprietary rights has been proved by evidence to be incorrect. Having regard to the rest of the evidence, it seems in the last degree improbable that he would consciously have made any admission adverse to his claim to be the *zemindar* or proprietor of his estate.

The Chief Justice has also relied on the fact that the defendant's predecessor, after the Permanent Settlement, did not seek for separation as he was entitled to do if his present case is true. Now it is matter of history that the number of *talukdars* entitled to separation was so great that Lord Wellesley's Government found it necessary to pass a Regulation in 1801 limiting the time for making such an application to three months from the date of the Regulation. In their Lordships'

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opinion the failure of the defendant's predecessor in this backward and remote part of the Presidency to put in an application within the time limited cannot be considered as raising any presumption that he was not entitled to make such an application.

Mullick, J., the other learned Judge, came to the conclusion that the plaintiff's predecessor, Mukand Singh, in 1764, conquered the territories of the Barsote Chief and reduced him into a state of complete subjection, that whatever claim to independence he had before that date was finally extinguished, and that thereafter he was allowed to remain in possession of a certain number of villages upon condition of loyal service.

Their Lordships entirely agree with the way in which this contention was dealt with by the Subordinate Judge. When the Company obtained the grant of the *diwani* in 1765 they did not at once begin collecting the revenue through their own officers, but put Mohammad Raza Khan in charge of Bengal and a Raja Shitab Rai in charge of Bihar. In September, 1771, he submitted a report (Ex. V) giving the history of the revenue administration from the time of Akbar, and an account of this particular district from 1719 to 1769, which shows an almost continuous condition of lawless violence in which the aggressive predecessors of the plaintiff waged private war on the surrounding *talukdars,* including the predecessors of the defendant. The letters of Captain Camac, who had been sent to Chota Nagpore to restore order, August, 1771, to November, 1772, show that Mukand Singh, the plaintiff's predecessor, was then in open rebellion and had ordered the *ryots* of Chay and Champey, which districts included Barsote, to cut and carry off their crops to the hills to prevent the Company from realizing their revenue, and that he was burning the villages which refused to obey. Eventually he was put to flight, and Tej Singh was installed in his place by the Company, and, dying shortly afterwards, was succeeded by his son, Paras Nath Singh. Before Tej Singh's installation, the position of the Ramgarh Rajah was simply that of a spoliator, and, in their Lordships' opinion, there is no presumption or likelihood of any lawful settlement having been made with the predecessors of the defendant reducing them to the position of *jagirdars.* The presumption rather is that the *talukdars* who had been driven out returned and resumed possession of their property when order was restored. In 1776 Mr. Grant Heatley came to Ramgarh to settle the Company's revenue, and it is recorded in the report of the

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Commissioner to the Government of Bengal on the land tenure of Hazaribagh, already mentioned, that the defendant's predecessor, with certain other Rajas, endeavoured to get a settlement made with them direct, but though they were maintained each in his Raj they were directed to pay their tribute through the then Ramgarh Raja. This is much more likely than that the Barsote Raja should have been reduced to the status of a *jagirdar*. The attempt of the Barsote Raja in 1843 to establish his right to pay revenue direct to Government, which was very possibly the origin of this suit, goes to show that payment to the revenue through the Ramgarh *zemindar* was still regarded as a grievance, which would not have been felt by anyone in the position of a *jagirdar*.'

Lastly, Mr. Upjohn, for the respondent, has put forward a new contention and has relied on the plaintiff's document (Ex. U), the *patta* of 1776, already mentioned, as the foundation of his client's title. This document had up to this stage of the case been impugned by his client and had been disregarded by the Courts below as having been rejected by the Courts in the rent suit of 1858. It is now said that it was only the receipts tendered in that suit which were rejected. The document is in Bengali and Hindi, the only material difference being that the words, "a few other *mouzas*," in the translation from the Bengali, are "several other *mauzas*" in the translation from the Hindi. The Bengali version is as follows:—

"To

Raja Pirthi Karan Deo.

"This *patta* is executed in 1183 to the following effect. Mauza Barsot and a few other *mauzas*, appertaining to Tappa Barsot, Pargana Champa, Chakla Ramgarh, which have been in your possession from before, shall continue to be in your direct possession. For the same you shall, according to instalments (fixed), pay a rent of Rs. 151 per annum, at the rate prevailing in the Chakla. You shall as usual be in possession of all the lands that are in your possession from before excepting the Debottar and Brahmottar lands and peacefully cultivate them. You won't have to pay for any loss, [etc. (?)] nor shall you be able to take (the same) from the tenants. Dated the 24th Shraban, 1833.

Ramgarh, 5th August, 1776, *tappa*,
Barsat, Champa."

This Bengali version also bears the signature of Major Simpson, the Personal Assistant to the Agent. The Hindi version, which is torn, does not now bear Major Simpson's signature, but it contains the date 29th July, 1843, in which his signature was affixed. It also contains the signature of Paras Nath Singh, the plaintiff's predecessor.

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The Judicial Commissioner, in the rent suit, stated that the *patta* bore no signature, but he appears to have looked only at the Bengali version. In the written statement of 1858 the defendant's ancestor stated that it was signed by the Collector, and Colonel Simpson, then Deputy Commissioner, who tried the case and was in a better position to judge, having seen and signed the document in 1843, states distinctly in his judgment that it was signed by the Collector. In these circumstances, their Lordships cannot say that it was not signed by the Collector, especially as the English date, the 5th August, 1776, suggests that there was an English signature. Colonel Simpson appears to have regarded the *patta* as confirming the title of the defendant's predecessor, and as directing that the *jama* (which was not and could not have been permanently fixed by Mr. Grant Heatley), should be paid to the Ramgarh Rajah, a course which, as has been seen, was adopted with regard to the neighbouring *talukdars*. In these circumstances, their Lordships are unable to accept Mr. Upjohn's contention, as to which, moreover, they have not had the assistance of the Courts below. It would, in their opinion, be most unsafe to treat this document as establishing the proprietary rights of the plaintiff.

On the whole, their Lordships are clearly of opinion that the plaintiff has failed to establish by evidence, as he is bound by statute to do, that these entries are incorrect. On the other hand, not only are these entries themselves, made after inquiry by experienced revenue officers, statutory evidence of great weight, but there are numerous indications that they are correct. It is most improbable that the defendant's predecessors who were undoubtedly originally the proprietors of the whole Pergana of Barsote were ever reduced to the status of *jagirdars* of the Ramgarh estate. They were always treated as the *zemindars* or proprietors of Barsote. As such the defendant's predecessor in 1843 resented having to pay revenue through the Ramgarh Rajah, and by his unwise attempt to escape from this obligation would appear to have provoked the latter to attempt to prove that he was only a *jagirdar*. There is no evidence that up to that time the Barsote estate was ever known as Lot Debang or Lot Debo, or as the "Barsote Lat," and the earlier accounts do not, as already shown, support the case that it was a *jagir*. The *kabuliyats* that, according to the plaint, were usually taken from *jagirdars* on their succession, were never taken from the defendant's predecessors. Lastly, the conclusions of Major Sifton, the Settlement Officer, were largely based on the *jama-*

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bandi statement put in by the plaintiff's predecessor prior to the Decennial Settlement of 1790. Neither side has attempted to obtain production of the original, and consequently no case has been made for the admission of secondary evidence, nor has any secondary evidence been tendered. The Subordinate Judge and one of the learned Judges in the High Court have referred to statements in paragraphs 65 and 66 of the Settlement Officer's Report on the Survey and Settlement of the Hazaribagh District, which does not appear to have been even exhibited in evidence, and the Subordinate Judge has held that the report may be treated as secondary evidence of the contents of the *jamabandi* statement under section 63 (5) of the Indian Evidence Act. In their Lordships' opinion the report is not secondary evidence of the contents of the documents referred to in it under clause (5), or under any other section, and they are therefore left to decide the question whether the entries made by the Settlement Officer are incorrect without seeing the evidence on which he chiefly relied.

In the result their Lordships have come to the conclusion from the reasons already stated that the appeal should be allowed and the decree of the Subordinate Judge dismissing the suit restored with costs throughout, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Watkins and Hunter.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Gordon Woodroffe & Co. .. *Plaintiffs**

v.

D. N. Radhakrishna Chetty and another .. *Defendants.*

Gordon Woodroffe & Co. *v.* Radhakrishna Chetty.

Contempt—Powers of High Court—Party in contempt committed to jail—Subsequent order for attachment of properties—Whether can be passed before expiry of term of imprisonment—Madras High Court Original Side Rules, O. 21, R. 5—Effect.

The High Court has the power to pass an order directing the attachment of the properties of the person in contempt after he has been committed to jail and before the expiry of the term of imprisonment.

O. 21, R. 5 of the Madras High Court Original Side Rules should be construed as merely regulative of the discretion vested in the High Court and not as curtailing its powers in proceedings for contempt.

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*C.S. No. 464 of 1926. 19th August, 1930.

Jurisdiction of the Madras High Court in matters of contempt traced.

The Advocate-General (A. Krishnaswami Aiyar) for the Crown.

V. Radhakrishnayya for party in contempt.

Mr. Sell of *Messrs. King and Partridge* for plaintiffs.

The Court delivered the following

JUDGMENT.—The notice calls upon Mr. Ranganatham Naidu of Messrs. Dowden & Co. to show cause why he should not be committed for contempt. He appears and has been examined. He says that he is the sole proprietor of Messrs. Dowden & Co. It is immaterial for the present whether this statement is true or not. Messrs. Dowden & Co. used to be frequently appointed by the Court, auctioneers to sell properties. In this case when the sale proclamation was settled the Master appointed them auctioneers to sell certain properties in execution of a mortgage decree. Mr. Ranganatham Naidu admits that the properties were sold by him in May, 1930, and that he in due course received the sale proceeds. It was his obvious duty to have brought the money into Court. He failed to do so and the only excuse he is able to offer is that the Court was then closed. As the Master points out, this did not prevent him from bringing in the money. In any case it could have been brought on the 14th July when the Court re-opened after the long recess. Again he made default and he swore to an affidavit on that day containing a report of the sale. Though it was sworn on the 14th it was filed in Court only on the 18th. The case came up before the Master for the sale being confirmed and he discovered that the money had not been paid. After some adjournments Mr. Ranganatham Naidu finally declared before the Master on the 28th July that he used the money for his own purposes, having utilised it in payment of his own creditors described in the Master's proceedings as Multanese creditors. Several orders were made by the Master requiring Mr. Ranganatham Naidu to bring in the money and, owing to his continued default, the case was posted before the Court. As it was represented to me that if time was granted money would be forthcoming, I adjourned the case, I think, four times. I gave him every opportunity to fulfil his obligation and all he is able to say to-day is, that if another adjournment is granted money may be forthcoming. In his evidence he says that his liabilities far exceed his assets, and if that is true there is very little possibility of the money coming in. Whether the statement in regard to his financial position is true

or not, I need not at present enquire. Mr. Ranganatham Naidu has committed a flagrant violation not only of the duty imposed upon him by the rules but has also disobeyed the successive orders made by the Master and by the Court. In these circumstances he is guilty of contempt and he shall stand committed to prison for a term of six months from this date, unless he shall at any time before the expiration of that term comply in all respects with the order for payment and purge himself of the contempt, in which case, he may apply for his discharge from imprisonment. (*See* for the form of the order *Origanti Venkataratnam* v. *K. Desikachari*[1].)

The notice issued to Mr. Ranganatham Naidu directs him to show cause not only why he should not be arrested but also why his properties should not be attached. As the learned Advocate-General has not been able to be present to-day I adjourn this part of the Motion to to-morrow.

It only remains to add that these proceedings were taken by the *Court suo motu*, as Mr. Sell, who appears for the plaintiffs in the case, not being sure of his legal position, did not desire to take any part in them.

As Mr. Ranganatham Naidu is in Court, I direct the bailiff to take him into custody.

[His Lordship subsequently heard arguments on the question whether the properties of the person in contempt can be attached before the expiry of the term of imprisonment and delivered the following judgment on 26th August, 1930.]

I adjourned this motion for considering the question whether the properties of the person in contempt could be attached. I directed notice to the Advocate-General and have had the advantage of hearing his argument. Mr. Radhakrishnayya, the counsel for the party, contends that under the Original Side Rules, O. 21, R. 5, the Court cannot attach the property of the person in contempt until the term limited in the warrant of imprisonment (the period of six months in the present case) expires. It is the soundness of this contention that requires to be examined. The question is, what is the power possessed by the High Court in regard to contempt independent of the Original Side Rules? Secondly, can such power be curtailed by the rules, in any event, has it been so curtailed? As I shall show presently, the High Court has inherited the powers of the old Supreme Court, which, in its turn, possessed the same

1. (1918) 36 M.L.J. 461.

power and authority as the Courts in England. What then was the extent of the jurisdiction and power of the English Courts? In *Perryman* v. *Dinham*[2] the defendant having been committed to the Fleet for not performing a decree, a sequestration was granted and the plaintiff was put into possession of the lands. The defendant objected that, he being in prison, the writ, amounting as it did to a double execution, was bad. This contention was overruled. In *Trigg* v. *Trigg*[3] the defendant being in contempt for not producing certain deeds, was taken on an attachment and turned over to the Fleet; nevertheless, a sequestration was ordered to issue against him. In *Dent* v. *Dent*[4] it was held that the Court had power to grant a sequestration, although no attachment had been issued. The question was more fully considered in *Miller* v. *Miller*[5]. It was argued in that case that it was the universal rule in the Courts of Equity that before an order of sequestration was made, it should be preceded by the issuing of a writ of attachment. The learned Judge overruled this contention observing:

"I have looked into the cases and I do not find that this practice is so universal as stated".

The observations of Sir R. T. Kindersley in In re *The East of England Bank*[6] are cited in the judgment:

"If the practice is that in order to obtain a writ of sequestration, you must first get a writ of attachment, the effect is that there is no provision for sequestration in the case of persons who are not resident in England."

The attachment referred to in this case is, of course, the 'attachment' of person. This case was followed in *Allen* v. *Allen*[7]. Daniel states the law thus:

"It was also competent to the party claiming the benefit of the decree, where the disobedient person either could not be arrested upon the process, or, having been arrested, remained in prison without paying obedience to the Court, to issue a writ of sequestration, directing the commissioners therein named to sequester the personal property of the defendant and the rents and profits of his real estates, and to keep him from the enjoyment of them, till he had cleared his contempt"—Daniel's Chancery Practice, 8th Ed., Vol. I, page 789.

The writ of sequestration referred to in the English books corresponds to what is known in this country as attachment of property. It is thus described in Edwards on *Execution*:

"The process of sequestration is a writ directed to certain persons, nominated by the person prosecuting the judgment or order, empowering

2. (1641-42) 17 Car. 1, f. 585: 21 E.R. 535.
3. (1759) Dic. 325: 21 E.R. 294.
4. (1867) L.R. 1 P. & D. 366.
5. (1870) L.R. 2 P. & D. 54.
6. (1864) 10 Jur. (N.S.) 1093.
7. (1885) L.R. 10 P. & D. 187.

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them to enter upon the real estate of the disobedient person, and to receive, sequestrate, and take the rents and profits thereof, and also his personal estate, and keep the same under sequestration in their hands until he shall have performed the act required and cleared his contempt''—1888 Ed., page 268.

The authorities I have cited show that sequestration may issue after the man has been committed to jail, although the term of imprisonment has not expired. In such a case, sequestration could issue concurrently with attachment by way of double process.

This then was the extent of the power possessed by the English Courts. The High Court is invested, as I shall show, with the same authority and jurisdiction.

The Supreme Court at Madras was established by the Charter of the 26th December, 1800. By clause 5 of that Charter, a Court of Record was constituted, to be called the Supreme Court of Judicature at Madras. By clause 8 that Court was invested with jurisdiction similar to the jurisdiction of the King's Bench in England. In the same way, it was also invested with the equitable jurisdiction of the kind possessed by the Court of Chancery. Clause 31 of the Charter, after enacting that the Supreme Court shall be a Court of Equity, proceeds to declare that it shall have the same power as the Court of Chancery in Great Britain, to administer justice and to compel *inter alia* obedience to the decrees and orders of the Court. The same clause very clearly provides that the Supreme Court shall exercise this power, as far as possible, in the same manner and to the same extent, as the High Chancellor of Great Britain. Thus, the power of the Supreme Court to punish for contempt was as extensive as that possessed by the Courts in England.

The High Court has inherited this power of the Supreme Court. Section 1 of the High Courts Act of 1861 says that it shall be lawful for His Majesty by Letters Patent to establish a High Court of Judicature at Madras. Section 8 provides that upon the establishment of such High Court, the Supreme Court and the Court of the Sudder Adawlut and Foujdarry Adawlut shall be abolished. Section 9 deals with the jurisdiction and powers of High Courts. It provides *inter alia* that, save as by such Letters Patent may be otherwise directed and without prejudice to the legislative powers of the Governor-General of India in Council, the High Court to be established shall have and exercise all jurisdiction and every power and

authority in any manner vested in any of the abolished Courts at the time of their abolition.

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In pursuance of this Act, a Letters Patent was issued and, while it recites in its preamble the provisions of section 9, does not restrict the power and jurisdiction of the High Court to punish for contempt. Nor has its power and authority, in so far as it is material to the present purpose, been curtailed or affected by any enactment of the Governor-General in Council. Finally, section 106 of the Government of India Act, which repeals the High Courts Act, provides that the several High Courts shall have all such jurisdiction, powers and authority as are vested in them at the commencement of the Act. The result is, that the High Court has the same power in this respect as was possessed by the old Supreme Court.

The next question that arises relates to the effect of O. 21, R. 5 of the Original Side Rules. It is under clause 37 of the Letters Patent and sections 122 and 129 of the Civil Procedure Code that the High Court is empowered to frame rules. It is in respect of proceedings in civil cases that power to make rules is conferred by these provisions. It has been suggested that the present motion to commit for contempt is a criminal matter and that the rules made by the High Court in so far as they deal with matters of a criminal nature are *ultra vires*. It is unnecessary to discuss this position, nor the cases, such as, *O'Shea* v. *O'Shea*[8], that have been cited on the point. I shall assume without deciding, that O. 21, R. 5 of the Original Side Rules is *intra vires*. Then, another question arises: The power that is conferred in regard to making rules is in respect of regulating procedure. If R. 5 has the effect of restricting the power of the High Court as suggested by the party's Counsel, can it be treated merely as a rule of procedure? As I have come to the conclusion that, on its true construction, the rule has no such effect, it is unnecessary to decide this point. R. 4 provides that the Court may commit the person in contempt to jail for such a limited time as it thinks fit. Rule 5 then goes on to say that if at the end of the time limited in the warrant of imprisonment, the party persists in his disobedience, his property may be attached. The question is, what is the effect of this rule? It merely enacts that, on the expiry of a certain period, the Court may issue a certain process. This shows how the discretion of the Court may ordinarily be exer-

8. (1890) L.R. 15 P. & D. 59.

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cised. In my opinion, no greater effect should be given to this rule. It would be wrong to hold by mere inference, that the power which the Court undoubtedly possesses is taken away.

"Statutes which limit or extend common law rights must be expressed in clear unambiguous language, such as those which take away the jurisdiction of the High Court of Justice"—27 Halsbury, page 150.

"No statute operates to repeal or modify the existing law, whether common or statutory, or to take away rights which existed before the statute was passed, unless the intention is clearly expressed or necessarily implied"—p. 167.

Here, we are not dealing with a statute, but with a rule made by the High Court, and these maxims apply with greater force. It is not only natural but proper to construe the rule in question, in the sense that it is merely regulative of the discretion, which undoubtedly vest in this Court. I have, therefore, come to the conclusion that attachment can issue against the property belonging to the party, although he is still in jail.

I was accordingly about to direct attachment but the party has cleared his contempt by paying the amount to the plaintiff's attorneys. They have reported satisfaction of the decree to the extent of Rs. 34,975, the entire sale proceeds, (I having disallowed the party in contempt not only the auctioneer's remuneration but also his charges for actual expenses incurred). The contempt having been cleared, there is no further need to attach his properties.

B.V.V. *Order for attachment not made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Meenakshi Ammal and others .. *Appellants**
(L. Rs. of the 1st Plaintiff and Party Appellant in the High Court)

v.

A. Rangaswami Aiyar and another .. *Respondents*
(Defendant and 2nd Plaintiff).

Meenakshi Ammal v. Rangaswami Aiyar.

Madras Estates Land Act (I of 1908), S. 112—Proceedings to recover arrears of rent—Notice sent to Collector—Subsequent sale of holding by landholder—Right to continue rent proceeding.

The landholder legally initiates proceedings under S. 112 of the Madras Estates Land Act if he sends the notices contemplated by the

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*S.As. Nos. 2242 and 2243 of 1927. 3rd December, 1929.

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section to the Collector in proper time. It cannot be said that the proceedings are initiated only when the ryots are actually served with those notices.

The landholder agreed on the 31st March, 1920, to transfer his rights in certain property to a stranger. In June, 1920, and on the 15th August, 1920, he instituted proceedings by sending the notices under S. 112 to the Collector in order to recover arrears of rent due to him in respect of that property. Subsequently, on the 16th August, 1920, he sold the property.

Held, that the landholder had the right to initiate proceedings at the time that he did, and that he could continue the same even after the sale.

Forbes v. *Maharaj Bahadur Singh,* (1914) L.R. 41 I.A. 91: I.L.R. 41 Cal. 926: 27 M.L.J. 4 (P.C.), explained.

Second Appeals against the decrees of the District Court of Ramnad at Madura in Appeal Suits Nos. 8 and 9 of 1924 preferred against the decrees of the Court of the Special Deputy Collector of Manamadura in Summary Suits Nos. 242 and 250 of 1922, respectively.

T. R. Ramachandra Aiyar, P. R. Ganapathi Aiyar and *K. P. Panchapagesa Aiyar* for appellants.

C. S. Venkatachariar and *M. S. Venkatarama Aiyar* for respondents.

The judgment of the Court was delivered by

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—The landholder proceeded to take steps under section 112 of the Estates Land Act to attach and sell the holding of the ryots for non-payment of arrears alleged to be due to him by the ryots. The ryots instituted the two suits, S.S. Nos. 242 and 250 of 1922, to set aside the attachment under section 112. Second Appeal No. 2242 relates to the suit filed to set aside the attachment in respect of the arrears for fasli 1329 and Second Appeal No. 2243 relates to the suit similarly instituted to set aside the attachment made by the landholder in respect of the arrears for fasli 1328. The main pleas raised by the ryots, the plaintiffs in these suits, were that the landholder had agreed on the 31st March, 1920, to transfer his rights as landholder in favour of a stranger. He took proceedings in respect of rent due for fasli 1329 on 15th August, 1920, and in respect of rent due for fasli 1328 in June, 1920. The sale-deed, however, was executed only on the 16th August, 1920. On these facts, the plea raised by the ryots that the landholder had no *locus standi* to take proceedings under section 112 of the Estates Land Act was overruled by both the Lower Courts. There was also a question raised on behalf of the ryots as to whether they had encroached on some portion of the Mulaimal land, and, if so, what rent was due by them in respect of the same for the faslis in question.

Meenakshi Ammal v. Rangaswami Aiyar.

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The first Court held that the encroachment was proved, whereas the Lower Appellate Court held that Ex. VI was not reliable, and that the alleged encroachment was not proved and consequently that the ryots were not bound to pay anything in respect of the alleged encroached lands. The ryots have preferred these second appeals.

The first point raised by the learned Advocate for the appellants in these cases is that the landholder is not entitled to take, or to continue, proceedings under section 112 of the Estates Land Act. The learned Advocate argued that the decision of the Privy Council in *Forbes* v. *Maharaj Bahadur Singh*[1] is an authority for the position that after a landholder transferred his interest as landholder in the lands to a stranger, he is not entitled to take any steps in respect of any past arrears under the Madras Estates Land Act. For the purpose of disposing of the present appeals, we think it is enough to confine our decision to the actual facts of these two cases. As already remarked, the landholder had initiated proceedings under section 112 of the Estates Land Act *before* he transferred his interest in the land to a third person. The case is not therefore one where a landholder, after a transfer of his rights in the lands, began proceedings under the Estates Land Act, The learned Advocate, however, argued that proceedings under section 112 could be taken to be initiated only when the ryots were actually served with notices. We are unable to agree with that contention. The landholder legally initiates proceedings under section 112 if he sends the notices contemplated by section 112 to the Collector in proper time. It is not disputed that the landholder's acts in sending the notices were in fact before he sold the properties to a stranger by a document dated the 16th August, 1920. In the Privy Council case their Lordships took care to remark at page 939:

"The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced."

Having regard to the facts of the present case, the landholder had the right to initiate proceedings at the time that he did, and therefore the learned Advocate's argument on the first point is not, in our view, sustainable.

The second question raised was that the Lower Appellate Court had not made deductions in respect of interest and road cess, in respect of the ryots' claim allowed on appeal. We

1. (1914) L.R. 41 I.A. 91: I.L.R. 41 C. 926: 27 M.L.J. 4 (P.C.).

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Anantakrishna Aiyar, J.

think that the Lower Appellate Court should have, when it decreased the amount of rent payable, also made a proportionate decrease in the amount of road cess and railway cess, and also interest payable. The decrees of the Lower Appellate Court will be modified accordingly, in that the landholder's claim to road cess, railway cess and interest will be proportionately decreased on the amounts disallowed by it.

The learned Advocate also argued that the rate at which the Lower Courts calculated railway cess and road cess was in excess of what was allowed by law. Such a question has not been raised in the Lower Courts and we cannot allow the learned Advocate to raise that point for the first time here in Second Appeal.

The last point that he raised was that patta was not properly served upon the ryots. This is not one of the points mentioned by the Lower Appellate Court to have been raised before it. In fact the Lower Appellate Court specifically remarks that, excepting the points dealt with by it, no other points were raised before it. Therefore we cannot allow this point to be raised before us in the circumstances.

Nor can we allow him to raise another point, namely, that the amount claimed in the attachment notices was not the amount actually due, because there were some subsequent payments.

For these reasons we think that, except in respect of the modification made above, the decrees of the Lower Courts should be confirmed. As the appellants have substantially failed, the Second Appeals will be dismissed with costs.

B.V.V. *Decrees modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Gunepally Thammayya and others .. *Appellants** (*Defendants*)

v.

Sri Rajah Tyadapusapati Khandendu Dhora Sri Viswanadha Mallapuraj Dakshinakavat Dugaraj Bahadur Garu .. *Respondent* (*Plaintiff*).

Thammayya *v.* Dugaraj Bahadur Garu.

Ganjam and Vizagapatam Agency Rules, R. 56—Suit for rent under S. 77, Madras Estates Land Act, 1908—Appeal to Agent—Limitation—Appli-

*S.As. Nos. 2107 to 2118 of 1927. 17th March, 1930.

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cability of S. 191, *Madras Estates Land Act—S.* 56 *of Agency Rules if* ultra vires—*Scheduled Districts Act,* 1874, *S.* 5 (*a*)—*General and Special Acts—Rules of interpretation.*

Held, (on a difference of opinion between Anantakrishna Aiyar and Curgenven, JJ.), that the period of limitation applicable to appeals preferred to the Agent to the Governor of Vizagapatam from decrees passed by the Special Assistant Agent, Vizagapatam Agency, in suits for rent instituted under S. 77 of the Madras Estates Land Act is six weeks as provided for by R. 56 of the Vizagapatam Agency Rules, and not thirty days as provided for by S. 191 of the Madras Estates Land Act.

Held, also, that R. 56 of the Agency Rules is not *ultra vires,* because it is not a rule "restricting" the operation of the Madras Estates Land Act but is one merely "modifying" it within the meaning of S. 5 (*a*) of the Scheduled Districts Act.

Rules as to interpretation of general and special Acts stated and applied.

Second Appeals against the decrees of the Court of the Agent to the Governor of Vizagapatam in Appeal Suits Nos. 8 to 19 of 1926 preferred against the decrees dated 14th June, 1926, of the Court of the Special Assistant Agent at Koraput in E.L. Suits Nos. 2 to 9 and 11 to 14 of 1926, respectively.

V. Govindarajachari for appellants.

Y. Suryanarayana for respondent.

These Second Appeals first came on for hearing before Anantakrishna Aiyar and Curgenven, JJ., who delivered the following differing

Anantakrishna Aiyar, J.

JUDGMENTS. *Anantakrishna Aiyar, J.*—The Zamindar of Pachipenta filed a batch of suits in the Court of the Special Assistant Agent at Koraput under section 77 of the Madras Estates Land Act against the defendants therein, who are ryots of Sunki village, to recover rent due for Faslis 1332 to 1334. The defendants denied the plaintiff's right to rent, and alleged that there was no relation of landlord and tenant existing between the parties, that the lands belonged to some Mokhasadars of Sunki to whom they have been paying rent. They further pleaded that the suit Kadapa was not valid and binding on the defendants. The Trial Court found against the contentions of the defendants and decreed the suits in plaintiff's favour. The defendants preferred appeals to the Court of the Agent to the Governor, Vizagapatam. The learned Agent to the Governor, Vizagapatam, dismissed the appeals on the preliminary ground that the appeals were filed after the expiry of 30 days prescribed by section 191 of the Madras Estates Land Act. He held that the time allowed for preferring an appeal under the Estates Land Act was 30 days, and not six

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Anantakrishna Aiyar, J.

weeks as provided for by R. 56 of the Vizagapatam Agency Rules. The defendants have preferred these second appeals.

The learned Advocate for the appellants argued that the special period of limitation prescribed by the Agency Rules, which are in force in the Scheduled Districts, governs the case, and not the general period of limitation prescribed by section 191 of the Estates Land Act, which, he submitted, is the general law regulating the relationship between the landlord and tenant in the Presidency. He submitted that regard should be had to the well-known maxim of law that the general law must give way to the special law applicable, and he contended that having regard to the local conditions (of which difficulty of communication is one), the Agency Rules have prescribed a special period of limitation for appeals to be preferred in the Agency tracts to the Government Agent. The learned Advocates are agreed that if the period of limitation applicable to these appeals be six weeks, then the appeals were not barred by limitation, but that if the period of limitation be only thirty days, then the appeals were barred.

During the argument, the learned Advocate for the respondent contended that under section 6 of the Scheduled Districts Act (XIV of 1874), the Local Government may from time to time regulate the procedure of the officers appointed under the Act to administer civil and criminal justice, etc., "but not so as to restrict the operation of any enactment for the time being in force in any of the said districts." He argued that R. 56 of the Vizagapatam Agency Rules prescribing six weeks for appeals, if taken to be applicable to appeals, under the Estates Land Act, would restrict the operation of the Estates Land Act which is in force in the Scheduled Districts, and, as such, would be *ultra vires*.

I am unable to agree with that contention. The Local Government has got power under Act XIV of 1874 to regulate the "procedure" of the officers appointed under that Act; Statute of Limitation is part of law of "procedure". This proposition was, in fact, not contested before us, and it is only necessary to quote the following passage from the judgment of the Privy Council in the case reported in *Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*[1]. The Privy Council observed:

"In truth, it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomi-

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1. (1852) 5 M.I.A. 234 at 265.

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nation, is a law relating to procedure having reference only to the *lex fori*."

Therefore, the Local Government has got power to provide periods of limitation applicable to various proceedings before such officers. The real question, therefore, is whether R. 56 of the Vizagapatam Agency Rules "restricts the operation" of the Madras Estates Land Act. As far as I could see, the "operation" of the Act could be restricted either with reference to particular classes of people, or with reference to any local area, or with reference to the time from which the Act is to have operation. If the rule in question does not restrict the operation of the Act in any of those, or similar, respects, I think it should be taken that the rule does not "restrict the operation" of any enactment within the meaning of section 6 of the Act. It may, of course, be said that any rule in any way (to however slight a degree) varying the substantial or the adjectival law contained in the Estates Land Act "restricts" the Act, in one sense; but I do not think that that is the meaning to be attached to the expression "restrict the operation of any enactment" occurring in the section.

The learned Advocates who argued the case were able to trace a similar rule, prescribing six weeks for appeal, from the year 1840; it is well known that even now as regards facilities of communication, people in the Agency tracts work under a very great disadvantage when compared with the people of other parts of the Presidency in general. One can, therefore, well understand why a comparatively long period of six weeks was fixed as the period of filing appeals, by R. 56, though in the other parts of the Presidency the period for preferring appeals has been for many years only thirty days, and is so even at present.

On the whole I have come to the conclusion that the rule in question is not *ultra vires*.

As regards the further question, I have no doubt that the Estates Land Act, which applies to the whole of the Presidency, should, in this respect, when considered in connection with the Agency Rules, be taken as a general law, whereas the Agency Rules should be taken as a special law, applicable to the Agency tracts. The Agency Rules have been framed to provide for the exceptional circumstances existing in that part of the Presidency. If the rules be not *ultra vires*, I think it is clear from them that the Legislature considered the special case of the Agency tracts, and provided a special period of limitation in respect of appeals to be presented to the Agent to the Gover-

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nor. The maxim that the special rule must be applied in preference to the general rule should, in my opinion, govern the present case. Various passages from Maxwell on "Interpretation of Statutes," Beal on "Cardinal Rules of Legal Interpretation" and Craies on "Statute Law" were quoted before us. I do not think it necessary to refer to them in detail. At page 470 of Beal's book, the rule is considered with reference to "prior general and subsequent special statutes". It is there stated:

> "Where there are provisions in a special statute which are clearly inconsistent with the provisions of a prior general statute, the provisions of the general statute must yield to those of the special statute. If the special statute gives in itself a complete rule on the subject, the expression of that rule will undoubtedly amount to an exception of the subject-matter of the rule out of the general Act."

Various authorities are quoted in support of the proposition at pages 470 and 471.

As, in my opinion, Agency Rule 56 is not *ultra vires,* I would allow these appeals, reverse the decrees of the Appellate Court and remand the appeals to the Lower Appellate Court for fresh disposal according to law. Costs here and in the Lower Appellate Court will abide the result. Court-fee paid on the second appeal memoranda will be refunded to the appellants.

Curgenven, J.

Curgenven, J.—I regret that I find myself in disagreement with my learned brother as to the meaning to be attached to the words "so as to restrict the operation of any enactment" occurring in clause (*b*) of section 6 of the Scheduled Districts Act.

Section 5 empowers the Local Government to extend to any of the Scheduled Districts, or any part of any such district, any enactment which is in force in any part of British India at the date of such extension. Section 5-A provides that, in so extending an enactment to a scheduled district or part thereof, the Local Government may declare the operation of the enactment to be "subject to such restrictions and modifications" as it thinks fit.

In construing the words "restrict the operation" in section 6 we may, I think, consider what meaning should be attached to the grammatical variant of the same phrase occurring in the next preceding section—"the operation to be subject to such restrictions". Does it mean, or mean only, that the Local Government may restrict the operation of the enactment as a whole to a particular area, or a particular class or a particular time? Clearly not to a particular area, because the section elsewhere provides for this by permitting the enact-

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ment to be extended to a scheduled district "or part thereof". The extension of an enactment to a particular class, where but for such a restriction, it would apply more generally, would be so rarely called for that I cannot believe that the Legislature had in view any such object in drafting the section; nor do I think, if the Act intended to confer upon the Local Government power to withdraw an enactment once extended, it would not have conferred it in more express terms. Let us then see what powers it was clearly expedient to give to the Local Government in extending an enactment to an area hitherto not "brought within . . . . the operation of the general Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature." Among those powers it was surely advisable to include (*a*) a power to exclude certain provisions of the enactment, and (*b*) a power to substitute for any provision a provision deemed more appropriate to the circumstances prevailing in the area. It appears to me that these two classes of power are intended to be conferred when it is said that the "Local Government may declare the operation of the enactment to be subject to such restrictions and modifications as that Government thinks fit." Deny to the word "restrictions" the meaning I seek to attach to it and it becomes very doubtful whether the Local Government by force merely of the word "modifications" would be competent to omit without replacement any provision of an enactment which it was extending.

Turning now to the meaning of the same phrase in section 6, we must, I think, endeavour to give it a construction if possible in keeping with the circumstances likely to arise and therefore in contemplation when the section was framed. Of the two meanings which the phrase may bear, should we choose that which would provide that by a regulation of procedure the Local Government may not withdraw the operation of the enactment from any area or class, or limit it to any period; or should we adopt the alternative construction which forbids the Government to override a statutory provision by prescribing a rule of procedure? I cannot myself easily conceive of any circumstances in which a Local Government might be tempted to secure a result of the former sort by a regulation of procedure, nor do I think that any such misuse of rule-making power can have been in contemplation when the section was framed. On the other hand in arranging to provide the scheduled districts with a body of law and of rules having the force of law, and, for the latter part of that purpose,

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in investing the Local Government with power to make rules, one would expect to find included in the enabling Act an interdiction against any rule that would conflict with the terms of, and thereby restrict the operation of, any enactment. . .

In the present case the conflict has arisen with regard to two rules of limitation, one laid down by statute, the other prescribed by rule. Something has been said before us as to the superior appropriateness of the period fixed by the latter means to the special conditions of the Agency tracts; but the answer may perhaps be that it was open to the Local Government by virtue of section 5-A to exclude statutory provisions relating to limitation if it wished to apply a six weeks' rule to all cases.

My view accordingly is that the rule of limitation contained in R. 56 of the Agency rules would, if applied to the appeals before us, offend against the terms of section 191 of the Madras Estates Land Act and, if deemed to prevail over that section, would *pro tanto* "restrict the operation of the Act". It is, therefore, *ultra vires*. I would, therefore, confirm the decrees of the Lower Appellate Court and dismiss the Second Appeals with costs.

Result.—As we are divided in opinion as to the decision to be given on the question,

"Whether the period of limitation applicable to appeals preferred to the Agent to the Governor of Vizagapatam from decrees passed by Special Assistant Agent (Vizagapatam Agency) in suits for rent instituted under section 77 of the Estates Land Act is six weeks as provided for by R. 56 of the Vizagapatam Agency Rules, or thirty days as provided for by section 191 of the Madras Estates Land Act,"

the matter will be placed before the learned Chief Justice so that the case may be heard by one or more of the other Judges of this Court as his Lordship may direct.

The Second Appeals having been referred to a third Judge the Court (Ramesam, J.) delivered the following

Ramesam, J.

JUDGMENT.—These second appeals have been referred to me by My Lord the Chief Justice on account of the difference of opinion between my brothers Anantakrishna Aiyar and Curgenven, JJ., who first heard them. They are filed under the Agency Rules applying to the Scheduled Districts.

The Zamindar of Pachipenta filed suits for rents under section 77 of the Madras Estates Land Act against his ryots and they were decreed by the Assistant Agent. The ryots filed appeals to the Agent to the Governor at Vizagapatam.

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These appeals were filed more than thirty days but within six weeks after the decrees. The time prescribed for appealing against a decree for rent to the District Collector is thirty days under section 191 of the Madras Estates Land Act, and six weeks under R. 56 of the Agency Rules. The Collector dismissed the appeals on the ground that they were barred by limitation applying section 191 of the Madras Estates Land Act. The ryots filed these second appeals against those decrees. The question is which rule ought to be applied.

The first point argued by the learned Advocate for the respondent is that R. 56 of the Agency Rules does not apply at all to appeals under the Estates Land Act, and only section 191 of the Act applies, and there is no question of conflict between the two sections. This argument does not seem to have been addressed before the learned Judges, or any rate, if it was, they apparently have not agreed with this contention. The contention is based on the fact that R. 1 defines the powers of the Agents and Assistant Agents followed by the heading "Civil Justice" which is the heading of the rules from R. 2 onwards. The learned Advocate contends that "Civil Justice" excludes judicial matters in Revenue Courts, that is, he takes the words "Civil Justice" in a narrow sense, namely administration of justice before ordinary civil courts of the land, such as the District Munsif, Subordinate Judge, District Judge and the High Court and Courts corresponding to them. But of course the word "Civil" has two senses—the narrow sense contended for by the Advocate and a larger sense, that is, as opposed to criminal only. In the Agency Rules of 1860, which were superseded by the present Agency Rules which were passed in 1924, the first six rules related to criminal justice and from R. 7 onwards they related to civil justice including Revenue Courts (*vide* Rule 10). When the Criminal Procedure Code of 1862 was passed the first six rules were repealed as the Code applied to the Agency tracts. But the rules from R. 7 onwards remained in force up to 1924, when they were superseded by the present rule; and a perusal of the present rules show that they were based on the former rules from R. 7 onwards. This comparison leads one to the view that the heading "Civil Justice" is used in the larger sense.

But the same conclusion can be reached without an examination of the former Agency Rules. Rule 1, sub-clause (2) says that the Agent to the Governor will have the same powers as are vested in the District and Revenue Courts in the ordi-

nary districts and the Agency Divisional Officers will have the same powers as the Subordinate and Revenue Courts for the trial and determination of suits. That means that, for revenue suits also, the Agents and the Agency Divisional Officers were constituted Courts under whatever enactment the revenue litigation may arise. This paragraph is not confined to the Estates Land Act. Then the section says that these powers are vested "subject to the modifications contained in these rules," that is, the powers conferred upon the District, Subordinate and Revenue Courts under the enactment under which the litigation may arise are conferred upon the Agents and Agency Divisional Officers, but subject to the modifications contained in the Agency Rules, that is, rules from R. 2 onwards to the end. By the express language of these rules, therefore, Rr. 2 to 56 apply to the Agents and Agency Divisional Officers exercising the powers of Revenue Courts. Whether this provision is valid or is *ultra vires* is of course another matter. But on the face of the rules, R. 56 applies to the Revenue Courts.

The next question is whether R. 56 prevails over or otherwise stands in the place of section 191 of the Estates Land Act; and this question was considered by the learned Judges who first heard the second appeals from the point of view whether the rule is *ultra vires*. Before I address myself to this point of view, I wish to approach this question from another point of view, namely, that perhaps such a question, namely, whether R. 56 is *ultra vires* does not arise at all. For this purpose I proceed to refer to the old Agency Rules which were passed in 1860. In 1898 there was a notification of the Government extending the Rent Recovery Act (the Act repealed by the Madras Estates Land Act) to the Agency tracts. But under that Act there were no suits for rent but suits to cancel distraints lay before a Collector and appeals against the decrees of the Collector lay to the District Collector, in lieu of whom, we have got the Agent to the Governor in the Agency tracts. The question might have arisen whether the time for appeal is the thirty days provided in the Rent Recovery Act or the six weeks provided by the then Agency Rules. I am not aware of any case in which the point has actually arisen and to discuss it now is unnecessary. Matters continued like this up to 1908 when the Rent Recovery Act was repealed and the Estates Land Act was passed, and it applied also to the Agency tracts. Section 208 of that Act contains a provision somewhat similar

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to R. 1, sub-clause (2) of the present Agency Rules, that is, the Agent would be the District Collector or the District Judge and the Agency Divisional Officer would be the Collector for the purpose of the Estates Land Act. Under R. 16 of the old Agency Rules the time allowed for an appeal to the Agent was six weeks.

I now proceed to discuss the question whether in 1908, when the Estates Land Act was passed, section 191 of the Estates Land Act superseded R. 16 of the old Agency Rules for the purpose of appeals to the Agent under the Act or whether R. 16 continued to be in force unaffected by section 191.

At first sight it may appear as if it is the same question as the question whether R. 56 of the present Agency Rules should prevail over S. 191 of the Estates Land Act. But it is not the same question. In 1908, when the Estates Land Act was passed, it came after the Agency Rules. In 1924, when the new Agency Rules were made, they came after the Estates Land Act, and from the point of view of the question whether the Agency Rules are *ultra vires,* this makes a considerable difference. So it is not the same question; and as, if it can be answered in a particular way with reference to the old Agency Rules, the other question does not arise at all, I proceed to discuss it.

Both R. 16 and section 191 have got statutory force. One is an actual section of an Act and the other is a rule passed under statutory powers. The general rule is, the later statute repeals the earlier statute, if both are equally general. But this rule is subject to an exception that, if the later Act is a general Act, but the earlier Act is a special Act, the earlier Act is generally not repealed by the later Act. Vide Craies on Statute Law, p. 316, citing *Seward* v. *"Vera Cruz"*.[2] In the present case, undoubtedly from one point of view the Agency Rules are special and the Estates Land Act is general. The Agency Rules apply only to a small area, Ganjam, Vizagapatam and Godavari, that is, they are similar to a local Act, whereas the Estates Land Act applies to the whole Presidency. But it is suggested by the learned Advocate for the respondent that the Estates Land Act is special and the Agency Rules are general from another point of view, that is, the Estates Land Act relates to the relationship between the landlords and the tenants but the Agency Rules do not relate to any particular class of

2. (1884) 10 A.C. 59.

whatever nature they may be. In this sense, no doubt the Agency Rules are general and the Estates Land Act is special. But in this sense, unless all the statute law of a country is contained only in one Code, most Acts are special even if they refer to a very large area; for instance, the Contract Act, the Specific Relief Act and the Transfer of Property Act, though they apply to the whole of India, are all special Acts because they relate only to certain branches of the law of the country.

The question then arises, when there is a conflict between two such special Acts each of which may be described as special in some particular sense, how far the later Act should prevail over the earlier Act. In such cases, it would seem that the rule is that the Court should lean against repeal of the earlier Act by implication and, unless it is absolutely clear that the operation of the first Act has to be curtailed by the later Act, the previous Act should be held to continue in force, even though the later Act may be regarded as special in some other sense. Illustrations of this are afforded by the decisions cited by the learned Advocate for the respondent. For instance, in *Mary Seward* v. *"Vera Cruz"*[2], first we had Lord Campbell's Act relating to claims for damages for loss of life by reason of a tort and later on the Admiralty Court Act of 1861 was passed giving jurisdiction over any claim for damage done by any ship. In this case it may be said that each Act is a special Act from one point of view but general from the other point of view. It was held that the jurisdiction under Lord Campbell's Act was not affected and the Admiralty Court Act had no jurisdiction under the second Act. At page 68 Lord Selborne says:

> "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

And he refers to the case of *Hawkins* v. *Gathercole*[3]. I may observe that he starts by saying: "Where there are general words in a later Act". He does not refer to the nature of the later Act, general or special. As I will presently show, though the Estates Land Act may be regarded as a special Act from one point of view, the provision in section 191 providing thirty days for first appeals is really a very general provision and not in the nature of a special provision.

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2. (1884) 10 A.C. 59. 3. (1855) 6 De G.M. & G. 1: 43 E.R. 1129.

Court Act giving jurisdiction over defendants who had employment within the city, though they did not dwell or carry on business there, and then came the County Courts Act of 1888. It was held that the first Act was unaffected by the second one. In In re *Smith's Estate. Clements* v. *Ward*[5], an earlier Act 43 Geo. 3, giving power to all persons to settle or devise lands or goods for any church, provided it was three months before death, was held not to be affected by the Married Women's Property Act, 1882, which gave absolute power to married women to dispose of property by will. Here the later Act is a special Act in the sense that it applied to married women and not to all persons, but the first Act is special in the sense that it dealt with property given to church, whereas the Married Women's Property Act dealt with all kinds of settlements and devises.

The general principle of a special Act not being repealed by a later Act was recognised by the Privy Council in a case from India in *Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitro*.[6] There their Lordships held that the rule of limitation under the Bengal Tenancy Act X of 1859 was not affected by the rule of limitation in Act XIV of 1859 which is a general Limitation Act. Now in that case, the first Act of course was a special Act as it related to the relation between the landholders and tenants in the Bengal Presidency, but from another point of view it may be said that the second Act is also a special Act because it relates only to one particular question of procedure, namely, limitation of actions, and does not deal with any substantial rights, whereas the earlier Bengal Tenancy Act deals not only with a question of procedure but with questions of substantial rights also relating to landlords and tenants. But from the point of view of the area to which the Acts applied, undoubtedly the first was special and the second was not. Their Lordships after relying on the general rule as laid down in *Fitzgerald* v. *Champneys*[7] refer with approval to the Full Bench decision in *Poulson* v. *Madhusudan Pal Chowdhry*[8]. In that case the learned Judges laid stress on the fact that the earlier Act was an Act applying to a

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4. (1891) 2 Q.B. 267.
5. (1887) 35 Ch. 589.
6. (1872) 15 Ben. L.R. 60 (P.C.) (Note).
7. (1861) 30 L.J. Ch. 777: 70 E.R. 958.
8. (1865) Beng. L.R. Supp. Vol. 101 (F.B.).

smaller area and the later Act applied to a larger area. In *Thorpe* v. *Adams*[9] Willes, J., said:

"The good sense of the law as laid down by my Lord is quite obvious: because, if a bill had been brought into Parliament to repeal the local Act, it never would have been allowed to pass into a law, etc., ... whereas, a general provision in a public Act is discussed with reference to general policy."

Thus it looks as if speciality in respect of locality is given greater importance rather than speciality in respect of the subject-matter; otherwise it would be impossible to compare the degree of speciality. *Khan Gul* v. *Lakha Singh*[10] discusses a question of conflict between the Contract Act and the Evidence Act with reference to applying the rule of estoppel against a minor and it was said that that construction which avoids repugnancy and if possible gives effect to both enactments should be adopted. It seems to me therefore that section 191 of the Estates Land Act, unless it expressly says so, ought not to be held to have affected R. 16 of the old Agency Rules.

The same matter may also be put in another way. The thirty days rule of limitation in section 191 is not a special provision. It is really a general provision. That is the rule under the Limitation Act for all first appeals, and the whole of the Limitation Act was adopted in the Estates Land Act except a few sections with which we are not concerned. *Vide* section 211, clause (2) of section 211 brought in the whole part of the Limitation Act relating to appeals. So it looks as if the Estates Land Act has adopted wholesale the general provisions of the Limitation Act. But because the articles relating to appeals apply only to appeals under the Civil Procedure Code and therefore these articles in terms will not apply to some appeals under the Estates Land Act because there is a change of Courts, it enacted section 191 so as to make the thirty days rule applicable also to appeals from Collectors to District Collectors as well as to District Judges. So that we have a very general provision simply adopted and repeated for the purpose of the Estates Land Act and not a special provision modifying a general provision being specially adopted in a special law. So that even if the Estates Land Act is regarded as a special law, what we have is the general provision for first appeals adopted and repeated in it and not specially modified for its purposes. So that when we look at the specific provision now under dis-

9. (1871) 6 C.P. 125.
10. (1928) I.L.R. 9 Lah. 701 (F.B.).

cussion the Estates Land Act contains a general provision, whereas the Agency Rules contain special provisions for the tract or area to which they apply. From this point of view also I hold that section 191 did not affect R. 16 of the old Agency Rules. So that from 1908 up to 1924 section 191 of the Estates Land Act never applied to the Agency tracts and R. 16 continued to be in force, that is, six weeks was the period for first appeals to the Agent. Now in 1924 the new Agency Rules were promulgated. They are merely rules consolidating and repeating the old rules in the Agency tracts. Section 191 never having been in force in the Agency tracts, the notification issuing the Agency Rules did not seek to restrict the Estates Land Act as it had been prevailing in the Agency tracts. From this point of view the question discussed by the learned Judges, namely, whether R. 56 of the Agency Rules is *ultra vires* of the Madras Government, because of section 6 (*b*) of the Scheduled Districts Act does not arise, and I hold that R. 56 is the only rule that applies to appeals.

Assuming I am wrong in the above conclusion, I have to discuss the question on the footing that section 191 applied to the Agency tracts up to 1924. The question will then arise whether the new Agency Rules are *ultra vires* or not. Anantakrishna Aiyar, J., held that they are not because R. 56 is not a rule restricting the operation of the Estates Land Act. Curgenven, J., held to the contrary. The phrase "subject to such restrictions and modifications" occurs in S. 5 (*a*) of the Scheduled Districts Act. The suggestion of Anantakrishna Aiyar, J., is that the word "restriction" occurring in sections 5 (*a*) and 6 is properly applicable to restriction in relation to areas or classes of persons and things of that kind. With reference to this suggestion Curgenven, J., observed that it could not mean restriction as to area because "the section (the learned Judge meant the Act) elsewhere provides for this by permitting the enactment to be extended to a scheduled district or part thereof". He repeats the same idea lower down where he says:

> "Let us then see what powers it was clearly expedient to give to the Local Government in *extending an enactment* to an area not hitherto brought within the operation of the general Acts and Regulations."

Section 5 refers to the extension to the scheduled district or part thereof of an enactment which up to the extension did not apply to the scheduled districts. But where we are dealing with an Act which from the inception applied to the Agency tracts and it is desired to limit the operation of the Act to a particular area, section 5 has nothing to do with such a case;

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and such limitation to one area and the omission of another area cannot be done under section 5. The power to do so must be conferred or refused by some other section. But the legislature thought it fit not to confer such power on the Local Government to make such restrictions and the word "restriction" in section 6 is necessary to cover the case of an area. I, therefore, do not agree with the reason given by my brother Curgenven, J., that restriction in section 6 cannot apply to area.

Then again, as to whether the restriction may refer to a particular class, Curgenven, J., observes that such a thing would be rarely called for. This is true. But that such a thing may be called for in the Agency tracts is clear from R. 9 of the old rules relating to the Zamindars, Bissoyees and other feudal chiefs, and R. 10 referring to succession of Hill Zamindaris. He then points out that the restriction was intended for the case of a power to exclude certain provisions in an enactment. I agree that the restriction may include such cases. But I do not agree that it is confined to this particular class. It may include also the cases of areas and persons. No doubt the word "modification" will not cover a case where it is intended to modify certain provisions of an enactment and the word "restriction" would be necessary. But where it is a question of substituting one provision by another provision which would be more appropriate certainly the word "modification" will do. Curgenven, J., seems to be of that opinion in the particular paragraph where he deals with this question. But, if so, R. 56 on the footing that it is sought to change the period in section 191 of the Estates Land Act is really a provision substituting one period, namely, six weeks, which was thought to be more proper for another period and, therefore, a modification. After all, some meaning must be given to the word "modification" which is mentioned in section 5-A but omitted in section 6. I am of opinion that the particular case with which we are dealing is a case of modification and not restriction. If the whole section is omitted one would perhaps say that it was restriction; but where it was a case of not omitting a section but substituting something for some other thing in it, I am of opinion that it is a modification. I, therefore, think that, even from the second point of view, R. 56 of the Agency Rules is not *ultra vires.*

I, therefore, hold that Rule 56 applied to the appeals before the Agent and they were not out of time. I, therefore, reverse the judgment of the Lower Court and remand the appeals to

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be disposed of according to law. The respondent will pay the costs of the S.A. No. 2107 to the appellant. No order as to costs in the other second appeals. The Court-fees in all the second appeals will be refunded.

I may add that, if it were necessary, I would excuse the delay committed by the appellants before the Agent's Court under section 4 of the Limitation Act which certainly applies to the Estates Land Act. But of course it is desirable to decide the point as excusing delay may not be available hereafter.

B.V.V. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE PAKENHAM WALSH.

Prasanna Venkatesa Rao and others .. *Appellants** *(Plaintiffs)*

v.

K. Srinivasa Rao and others .. *Respondents* *(Defendants).*

Prasanna Venkatesa Rao v. Srinivasa Rao.

*Association for religious purposes—Societies Registration Act (XXI of 1860)—Memorandum of Association—Resolution by the majority, opposed to the constitution—*Ultra vires.

In a general body meeting of a Sabha formed by the disciples of the various Madhwa mutts "for the uplift of their doctrine," a resolution for giving priority to the head of one of the mutts in the receiving of *thirtham* was passed by the majority. The resolution being opposed fundamentally to the constitution of the association, it was sought to bring it within a clause of the Memorandum of the Association and the Rules and Regulations pertaining thereto, by which the council was empowered to frame such by-laws as were not inconsistent with the rules and regulations as the association might consider necessary for the conduct, maintenance, and upkeep of the Sabha.

Held, that the disciples of one mutt, though they formed the majority of the members, have no right virtually to drive the other members of the Sabha by the passing of a resolution which could give their Guru priority.

It is not open to the majority of the members of the association to alter the fundamental principles upon which the association is founded.

Milligan v. *Mitchell,* (1837) 3 My. & Cr. 72: 40 E.R. 852 at 856 and *Free Church of Scotland (General Assembly of)* v. *Overtoun (Lord). Macalister* v. *Young,* (1904) A.C. 515, referred to.

Per *Pakenham Walsh, J.*—A corporation can, no doubt, do what is incidental to the purpose of its business, but it cannot travel outside the same.

Dundee Harbour Trustees v. *D. & J. Nicol,* (1915) A.C. 550, referred to.

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*Appeal No. 219 of 1925. 20th November, 1929.

not inconsistent with the rules and regulations as it may consider necessary for the conduct, maintenance, and upkeep of the Sabha and a like power to alter, modify or rescind any such by-laws, so long as such by-laws are passed at the annual general meeting of the Sabha. If the matter related merely to the internal management without in any way affecting the fundamental basis on which the Sabha was started, the majority decision would bind the minority, however galling it may be;

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wanted a scheme to be framed. However this may be, it seems to me that justice has to be done to the parties and mere expediency cannot entitle the Court to deny justice to the majority.

It is clear that it is not open to the majority to alter the fundamental principles upon which the Association is founded. I may refer to *Milligan* v. *Mitchell*[1] and *Free Church of Scotland (General Assembly of)* v. *Overtoun (Lord). Macalister* v. *Young*[2].

In *Milligan* v. *Mitchell*[1] it was held that it was not competent to the members of the Association to alter

"the fundamental principles upon which the association was formed and destroy the trusts upon which the property was held, but only to altering the laws or making new laws, so far as might be consistent with such principles and trusts.'

In that case, a chapel was erected and dedicated exclusively as a place of worship for Presbyterians who conformed to the discipline and doctrines of the National Church of Scotland. Then there was a resolution passed subsequently, whereby other preachers were allowed to preach and the question was how far the resolution passed by the general body was valid. In *Free Church of Scotland (General Assembly of)* v. *Overtoun (Lord). Macalister* v. *Young*[2] Lord Davey observed at page 645:

"The question in each case is, What were the religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself a power in some recognised body to control, alter or modify the tenets and principles at one time professed by the association. But the existence of such a power would have to be proved like any other tenet or principle of the association."

I may also, in this connection, refer to *Attorney-General* v. *Anderson*[3]. It was held in that case that where property was directed to be held in trust to be used as a meeting-house for Protestant Dissenters of the Presbyterian or Independent denomination, a resolution to transfer the chapel and congregation to the Presbyterian Church of England though passed by a majority was invalid.

In the view I take that the giving of precedence in the matter of *thirtham* will be a fundamental alteration of the principles on which the Sabha was (founded?) and is not a

1. (1837) 3 My. & Cr. 72: 40 E.R. 852.
2. (1904) A.C. 515.
3. (1888) L.J. 57 Ch. D. 543.

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matter of mere internal management, it is unnecessary to refer to *Cooper* v. *Gordon*[4] and the other cases cited by the respondents' advocate, as to the Court not interfering in affairs of internal management decided upon by the majority of members.

As the decision of the Subordinate Judge on the preliminary issues as to the maintainability of the suit under section 92 of the Civil Procedure Code or the suit being not cognizable by a Civil Court was not seriously disputed before us, I do not think it necessary to refer to the decision cited by the Subordinate Judge in his preliminary judgment. I agree with him in deciding the preliminary issue in plaintiffs' favour.

The next question is as to what relief is to be granted. I think the plaintiffs are entitled to a declaration that it is not competent to the majority of the members to make any distinction between the Mutts as regards *thirtham* or any other honours or to give priority to the head of any one Mutt over the rest in the distribution of *thirtham* or any honour.

[After holding that the articles and rules of the Association provided sufficient safeguards for its proper working in the future, his Lordship gave certain directions for the conduct of the meetings of the Sabha in future, held that the framing of a scheme was unnecessary and proceeded as follows:—]

I would reverse the decree of the Lower Court and pass a decree in the terms above stated. The Sabha (represented by its committee) and 12th respondent, the Guru of the Uttarathi Mutt, will pay the appellants' costs both here and in the Lower Court.

We fix the Vakils' fee in this Court at Rs. 500.

The decree I pass disposes of the Memorandum of Objections. No costs.

Pakenham Walsh, J.

Pakenham Walsh, J.—[After dealing with the facts and discussing the evidence, His Lordship continued:]

I hold that the defendants have failed to prove that there was any custom by which the Uttarathi Mutt received first *thirtham* and that the evidence both oral and documentary is distinctly in favour of the contention of the plaintiffs that there was no such custom. Even admitting that in practice any such thing arose, I should be inclined to agree with the learned Advocate-General in holding that legal recognition of such a claim would be subversive of the objects of the society and that

4. (1869) L.R. 8 Eq. 249 at 258.

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even a majority resolution in its favour cannot be given effect to. There is a vast difference between mere practice in a matter of this sort and recognition of this practice as a right conferring a superior status in a society whose basic object is equality. The right to first *thirtham* may be, and is no doubt, considered as a mark of superiority in temples and other places; but that will not mean that there is to be superiority in a society of this sort. If I might quote a sort of analogy, I suppose it is likely that when His Majesty the King-Emperor attends a celebration of the Sacrament, he would be communicated before the other members of the congregation; yet, I feel little doubt that to recognize any such priority as of right would be fundamentally opposed to the entire conception of the Sacrament and would be in contravention of its basic idea.

It was suggested that the Sabha are not trustees and can therefore act as they pleased. This does not appear to be correct—*vide* Halsbury, Vol. IV, section 557, which says:

"As charitable corporations exist solely for the accomplishment of charitable purposes, they are necessarily trustees of their corporate property, whether the beneficiaries are members of the corporation, as in the case of hospitals and colleges, or not. Accordingly, like other trustees, charitable or otherwise, they are subject to the jurisdiction of the Court."

A corporation can no doubt do what is incidental to the purpose of its business, but it cannot travel outside this—vide *Dundee Harbour Trustees* v. *D. & J. Dicol.*[5] As to the power of a majority to change the fundamental purposes and principles of the main body, *Free Church of Scotland (General Assembly of)* v. *Overtoun (Lord)*. *Macalister* v. *Young*[2] may be referred to where the majority of the Free Church of Scotland united with a body known as the United Presbyterian Church and it was held that, because the tenets of the latter body on the question of the Establishment principle and the Westminster Confession were not identical with those under which the Free Church held the property in dispute, the minority which adhered to the original view of the Free Church were entitled to the property—*vide* remarks at pages 613, 645 and 648. In such a case one dissentient is enough, *Attorney-General* v. *Anderson*[3], and there is no power to alter the central conditions of the society—vide *Milligan* v. *Mitchell*[1], unless there is such power specially reserved, which must be proved. Of the cases quoted on the other side, there is only one that appears to be relevant and the remark there is *obiter*. This is the

1. (1837) 3 My. & Cr. 72: 40 E.R. 852 at 856.
2. (1904) A.C. 515. 3. (1888) L.J. 57 Ch.D. 543 at 550.
5. (1915) A.C. 550.

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remark in *Cooper* v. *Gordon*[4]. In that case, by t of a congregation of Independents, a chapel, a hc property were vested in trustees for the use of tion, and to permit the minister for the time be the house. The deeds contained no express pro appointment or removal of a minister. In 18 Samuel Clarke Gordon was invited by a resc Church members of the congregation to become the then minister. In 1868, a majority of the Ch resolved that Gordon be dismissed, and the m trustees concurred in this resolution. Gordon cl his office for life, in the absence of immorality contrary to the tenets of the denomination, w charged. It was held that he was duly dismiss would present no difficulty, but there is a remar Stuart, V.C., to the following effect:—

"In his answer Mr. Gordon says, that, in the absen usage or rules, the will of every such congregation is i tained and their powers exercised by the votes of the persons in church fellowship worshipping at the particula adds this qualification—that the minority are bound by th points so long as such majority act consistently with doctrines and principles held by the whole body. Such futile, because as soon as the fundamental doctrines ar the majority, they cease to be the fundamental doctrir body, and unless the minority submit there is no longer a together by fundamental doctrines and principles."

It appears to me that this remark which unnecessary for the determination of the case conciled with the *ratio decidendi* of *Free Chur (General Assembly of)* v. *Overtoun (Lord)*. *Young*[2], where the Lord Chancellor quoted at approval the dictum of Smith, B., in *Dill* v. I he said:

"We do not coerce our neighbour by calling for his profession or articles of faith. We leave him free to diate that faith, according as his reason, his conscienc of God may direct him. We but say to him, If you a your signature to certain articles, or in some way notif of their truth; or, if you disagree, withhold such signat And we say of him, in the former case, that he *is*, and that he *is not* of our religion. We do not compel him we but ask him to inform us, by certain acts, whether does not; and we ask this, only if he claims to be enro body, and to be in religious communion with us. In th

2. (1904) A.C. 515.

4. (1869) L.R. 8 Eq. 249 at 257.

6. (1836) 2 Jones Rep. (Ir. Ex.) 48, 91

a test, our Establishment would not be a rock, cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while-really unconnected mass; fraught with nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension."

Raghunath Damodhar v. *Janardhan Gopal*[7] and *Lalji Shamji* v. *Walji Wardhman*[8] are cases relating to caste decisions where it was held that the decision was in the power of the majority of the caste for their own comfort and convenience and not a matter in which the Court could interfere. *Hasan Raza Sahib* v. *Hasan Ali Sahib*[9] was merely a matter of election to a committee and *Ramados* v. *Hanumantha Rao*[10] dealt with the right of the majority of the villagers to manage the temple. There is nothing in these cases to show that the majority of a body can alter the fundamental objects of the body unless such a power is specially reserved.

I therefore hold that the resolution is *ultra vires* and that this would not be altered by any practice having grown up of giving first *thirtham* to the representative of the Uttarathi Mutt. I further hold that by the constitution the majority have no power to declare one Mutt superior in the Sabha to any other Mutt. [His Lordship then held that in the circumstances of the case the framing of a scheme was unnecessary and proceeded:]

I agree with the other directions which my learned brother proposed to give as to the conduct of meetings.

I concur with him that the decree of the Lower Court should be reversed and a decree in the terms stated by him passed.

I also agree as regards costs and memorandum of objections.

K.C. *Decree reversed.*

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7. (1891) I.L.R. 15 B. 599. 8. (1895) I.L.R. 19 B. 507.
9. (1916) I.L.R. 40 M. 941: 33 M.L.J. 348.
10. (1911) I.L.R. 36 M. 364: 21 M.L.J. 952.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice*, MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

S. M. P. Periaswami Nadar and others .. *Petitioners**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

F. B.

Periaswami Nadar *v.* Commissioner of Income-tax, Madras.

Indian Income-tax Act (XI of 1922), S. 10 (2) (iii)—Partnership business—No borrowed capital—Profits earned by the partnership allowed to remain as capital—Interest on such profits paid to partners—Whether the interest payments can be deducted from the assessable income.

Where a partnership business with a large turnover could not possibly be conducted without some capital and a certain amount of the profits earned by the partnership was allowed to remain in the partnership as capital by means of which to carry on the partnership, interest payments made to the partners upon such profits do not come within the provision of S. 10 (2) (*iii*) of the Indian Income-tax Act, as the payments of interest were dependent on the earning of profits.

Commissioner of Income-tax, Madras v. *Subramaniam Chettiar,* (1928) I.L.R. 51 Mad. 787: 55 M.L.J. 416 (F.B.), distinguished.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

This is a case of an unregistered firm consisting of V. P. Periaswami Nadar, P. P. Sivanandi Nadar and K. P. M. Shanmuga Nadar, who are the petitioners. The firm was assessed for the year 1928-29 on an income of Rs. 25,905 by the Income-tax Officer, Virudhunagar. In computing the profits the Income-tax Officer disallowed three sums aggregating to Rs. 7,633-4-0 being the interest paid to the three partners on the ground that these sums represented interest paid on the capital of the partners and not interest paid by the firm on any "loan". In its appeal to the Assistant Commissioner against the assessment the firm contended that the sums standing to the credit of the partners' accounts represented loans made by them to the partnership. Attention was also drawn to the fact that there was a sum of Rs. 38,993 standing at the credit of the Bad Debts Reserve Fund account on which no interest was charged. In disposing of the appeal the Assistant Commissioner reduced the total taxable income of the firm to Rs. 25,820 but did not alter the assessment, so far as the disallowance of the sum of Rs. 7,633-4-0 was concerned. The petitioners have now asked me to refer to the High Court under section 66 (2) the following questions alleged to be questions of law arising out of the order of the Assistant Commissioner:—

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*O.P. No. 179 of 1929. 11th April, 1930.

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1. Whether under the circumstances stated above, the amount of Rs. 38,993 is the capital of the petitioners' partnership?

2. Whether interest payments made to partners in cases of firms which have no subscribed capital would be admissible charged under section 10 (2) (*iii*) of the Act?

3. Whether interest payments made to the partners of the petitioners' firm, under the circumstances mentioned in the petition and in the order of the Assistant Commissioner of Income-tax are admissible items of expenditure, under section 10 (2) (*iii*)?

The only question which arises in this case is whether there was a legal loan to the firm by the partners. This question is clearly one of fact. The books do not show any account for capital other than the accounts standing in the names of the three partners. There is no agreement either defining the capital to be subscribed by the partners or setting out the manner in which loans are to be raised or laying down the terms on which the alleged loans have been advanced. On the other hand there is the fact that the amounts to the credit of the three partners stand in ledger folios headed "Muthalvaravu" account. The petitioners, however, contend that these amounts represent loans made by the partners to the business and do not constitute the capital of the business and in support of this claim they adduce the following arguments:—

(1) that it is possible to carry on a thriving business without capital and the nature of their business was such that no initial capital was necessary,

(2) that if any amount has to be treated as the capital it should be the sum of Rs. 38,993 at credit of the Bad Debts Reserve Fund account,

(3) that no weight attaches to the heading "Muthalvaravu" in the ledger folios, the correct equivalent of "capital" being "Moolathanam," and that, therefore, the sums in question are not capital,

(4) that, in the alternative, they should be held to be borrowed capital, and

(5) that the fact that interest is paid on the amounts in question is itself evidence of a loan.

It is no doubt possible in certain cases to carry on business entirely on borrowed capital, but in such cases it has to be proved that the capital employed is really borrowed capital and the question whether the capital is "borrowed" or not is purely a question of fact. In the present case, it has not been admitted by the Income-tax authorities that the petitioners' business needs no capital.

As regards the reserve for bad debts, I hold that this has been formed for the purpose which the name indicates and I find that it has undoubtedly been utilised for that purpose. It is

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to all intents and purposes a reserve fund and can in any sense therefore be regarded as subscribed capital and it has not been admitted by the Income-tax authorities that the amount of this fund is the capital or part of the capital of the business. The elaborate explanation that has been given regarding the Tamil equivalent of "capital" has no force. It is well known that the word "Muthalvaravu" is the term invariably adopted in Tamil accounts to represent capital. The final argument which is relied on as proof that the amounts in question are "loans" is that interest has been adjusted on these amounts. This, in my opinion, is no evidence that the amounts represent loans. The adjustment is no more than an arrangement adopted, in view of the fluctuating nature of the amount of capital advanced by the partners, to secure an appropriate variation of the shares of the three partners in the profits of the firm. I consider, therefore, that the authorities below rightly held that the petitioners have not proved the existence of a legal loan. On this finding no question of law arises. I therefore dismiss the application.

K. V. Sesha Aiyangar for petitioners.

M. Patanjali Sastri for respondent.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *The Chief Justice.*—On this petition we are asked to direct the Commissioner of Income-tax to refer the following question:—

"Whether interest payments made to partners of the petitioners' firm, under the circumstances mentioned in the petition, and in the order of the Assistant Commissioner of Income-tax are admissible items of expenditure under section 10 (2) (*iii*) of the Indian Income-tax Act."

The assessees are a partnership firm carrying on business in the purchase and sale of cotton seeds and it appears now to be a very flourishing business. In the year of assessment, 1928-1929, it was assessed to income-tax in the amount of Rs. 25,095. In arriving at this assessment, the Income-tax Officer disallowed a sum of Rs. 7,633-4-0, which the assessees claimed to be entitled to a deduction of from the gross profits of the partnership. They based their claim, as is apparent from the question we are asked to direct the Commissioner of Income-tax to refer, on section 10 (2) (*iii*) of the Income-tax Act. That section allows a deduction "in respect of capital borrowed for the purpose of the business where the payment of interest thereon is not in any way dependent upon the earning of profits, the amount of interest paid". It was contended by the assessees that this sum of money was interest on capital borrowed from or at least a loan to the partnership by the individual partners and as such not assessable to income-tax. In this connection much reliance was placed by Mr. K. V. Sesha Aiyangar

on the Full Bench decision in *Commissioner of Income-tax* v. *Subramaniam Chettiar.*[1] There a Full Bench of which I was a member held that where a partner genuinely lends money, beyond the initial capital, to the partnership at an agreed reasonable rate of interest and the money is used for capital expenditure, the interest paid by the partnership to him in the year of assessment must be deducted in computing the profits or gains of the partnership as provided by section 10 (2) (*iii*) of the Indian Income-tax Act. That is all that that case decides; and when the facts of the case are looked into, it will be seen that before the partnership started, there was an agreement in which the amount of capital contributed by each of the partners was set out and the rate of interest agreed to be paid upon the capital so contributed was also agreed upon. In this case there is no such agreement. Furthermore, in the agreement in that case, there was a provision that after the partnership started working, the partners might contribute further capital to the partnership, and that if they did so, they should receive interest at a certain rate on the capital so contributed. That case in no way, in our view, supports the contention of Mr. Sesha Aiyangar. There is no agreement whatever in the present case to contribute any capital or lend any monies nor is there an agreement to pay any interest. It is contended by the assessees that when the partnership started the business, the business was a very small one and that there was no initial capital. But it is quite obvious as the Assistant Commissioner of Income-tax says in his order that a business with so large a turnover as this one could not possibly be conducted without some capital and that what happened in this case was that a certain amount of the profits earned by the partnership were allowed to remain in the partnership as capital by means of which to carry on the partnership. This is a very different case to the Full Bench case where there was a specific agreement to contribute further capital beyond the initial capital already contributed. There is a further difficulty in the way of Mr. Sesha Aiyangar, namely, that whereas in the Full Bench case there was an agreement to pay a fixed rate of interest, here, as I have already stated, there was no agreement to pay any interest at all. But as a fact it does appear that for a period of 17 years 12 per cent. interest was paid on the amounts allowed to remain in the partnership by the partners and it is therefore quite obvious that in those years the partnership earned

1. (1928) I.L.R. 51 M. 787: 55 M.L.J. 416 (F.B.).

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sufficient profits to enable the partnership to pay that high rate of interest. It must also be equally clear that had there been no such profits, no such rate of interest could have been paid. Therefore, the payment of interest was dependent on the earning of profits. There is not as in the Full Bench case a definite and an enforceable agreement to pay interest. What was strenuously argued before us in that case so far as my recollection serves me was that, quite irrespective of any profits being earned the rate of interest agreed upon was payable. Mr. Sesha Aiyangar is, therefore, unable to bring himself within the provision of section 10 (2) (*iii*) of the Indian Income-tax Act.

Another matter which I think I ought to mention is that Thiruvenkatachariar, J., who was a member of that Full Bench in his answer to the question referred stated that this question is purely a question of fact, and with that statement I am inclined to agree.

Under these circumstances, we decline to direct the Commissioner of Income-tax to refer this case. The assessees will pay Rs. 150 costs to the Commissioner.

Anantakrishna Aiyar, J.—I agree.

Curgenven, J.—I agree.

K.C. *Reference declined.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice* AND MR. JUSTICE CURGENVEN.

T. S. Ramabhadra Odayar and another .. *Appellants**
(*Plaintiff and Supplemental Appellant*)

v.

T. S. Gopalaswami Odayar and others .. *Respondents*
(*Defendants 1 to 10 and 27 and 28 and Party Respondent and Supplemental Respondent*).

Ramabhadra Odayar *v.* Gopalaswami Odayar.

Hindu Law—Partition—Intention—Ascertainment of shares—Division contemplated in future—Parties to be governed by survivorship in the meanwhile—Effect—Construction—Family settlement.

Every endeavour should be made to ascertain from the document, read as a whole, what was the expressed intention of the parties to it. Each part must, if possible, be reconciled to the remainder, because it must be presumed, unless such presumption is forbidden by the language, that it was drafted to subserve a consistent purpose.

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*Appeals Nos. 439 and 411 of 1925. 1st May, 1930.

A document styled a deed of partition and entered into between all the adult members of a joint Hindu family after providing for the immediate separation of one of the members, purported to divide the remaining properties into five equal shares to be taken by the five groups of remaining members. The document recited *inter alia* that all the members except the one who had been sent out should, during the life-time of the then oldest member of the family, live as members of a joint family, that after his death, partition should be effected according to the shares fixed and that so long as they continued joint, the family should be subject to the law of survivorship. The effect of this document was the question for consideration before their Lordships.

Held, partition or no partition is a matter entirely of intention. The mere ascertainment of shares of the remaining members on the separation of one of them does not *per se* operate as a disruption of status of all of them without a present intention to divide in status on the part of the remaining members. In all the cases where a definition of shares was held to have the effect of converting the joint tenancy of a coparcenary into a tenancy-in-common, there was a present intention to divide. Without such an intention the deed cannot as a matter of legal consequence result in the severance of the coparcenary. *Appovier* v. *Ramasubba Aiyan*, (1866) 11 M.I.A. 75: 20 E.R. 30; *Balabux* v. *Rukhmabai*, (1903) L.R. 30 I.A. 130: I.L.R. 30 C. 725 (P.C.); *Parbati* v. *Naunihal Singh*, (1909) L.R. 36 I.A. 71: I.L.R. 31 A. 412: 19 M.L.J. 517 (P.C.) and *Syed Kasam* v. *Jorawar Singh*, (1922) L.R. 49 I.A. 358: I.L.R. 50 C. 84: 43 M.L.J. 676 (P.C.), distinguished.

Palani Ammal v. *Muthuvenkatachala Moniagar*, (1924) L.R. 52 I.A. 83: I.L.R. 48 M. 254: 48 M.L.J. 83 (P.C.); same case in the High Court in (1917) 33 M.L.J. 759 (H.C.) and *Venkatachala Pillai* v. *Arunthavathachi*, (1922) 17 L.W. 755, followed.

There is no doubt that at the time of partition the members may by general agreement distribute the property otherwise than as the Hindu Law provides and there seems no reason why such an agreement cannot be entered into beforehand, why the parties cannot agree to certain principles of partition, to be applied *in futuro* without becoming tenants-in-common. *Lakshmi Chand* v. *Anandi*, (1926) L.R. 53 I.A. 123: I.L.R. 48 A. 313: 51 M.L.J. 52 (P.C.), referred to.

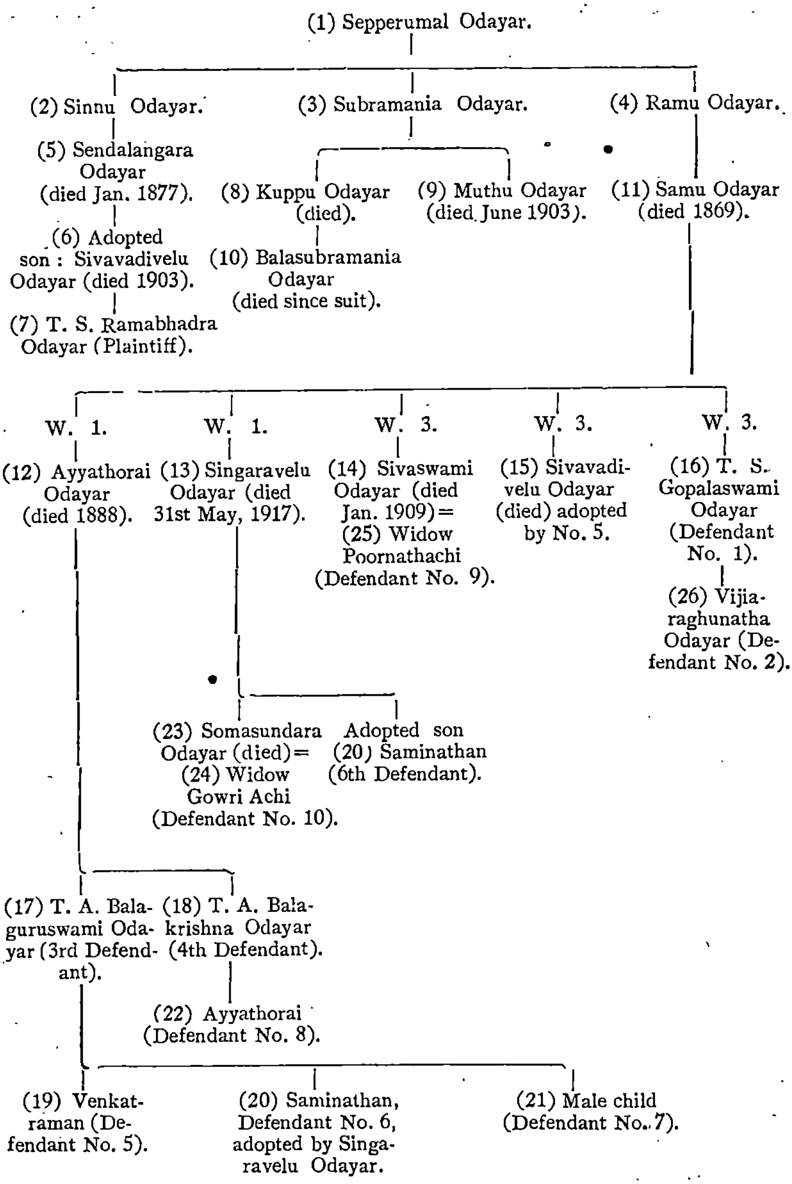
The document is also binding in so far as it put an end to various family disputes relating, *e.g.*, to the adoption of a member, to the question whether certain properties were the self-acquired properties of a particular member of the joint family and so on. "Just as where a number of creditors accept a composition, so in the general give-and-take and composing of differences the deed as a family settlement is binding upon its signatories and those claiming under him."

The accounts, on partition of such a family, should be taken on the basis of an undivided family, following the form in *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar*, (1927) I.L.R. 50 M. 866 at 873: 53 M.L.J. 189.

Appeals against the decree of the Court of the Subordinate Judge of Kumbakonam, dated 25th October, 1924, in O.S. No. 22 of 1924.

SUIT FOR PARTITION.

The parties to the suit were members of a Hindu family who owned a considerable estate at Thannirkunnam (Mannargudi Taluk) and other properties in the Tanjore District. They were related to one another as shown in the genealogical table set out below:



From about 1890, there were certain disputes in the family. The plaintiff's father Sivavadivelu Odayar was alleged to have been adopted by Sendalangara Odayar; this was denied by others. Certain properties of the family were claimed by some of the members as their own self-acquisitions. There were also disputes as to who were entitled to share in the family properties and as to the share each was entitled to. Balasubramania Odayar, one of the two representatives of the second branch, wanted definitely to cut himself off from the family and on 25th November,

1895, all the members entered into a deed of family settlement by which they sought to put an end to all present and possible disputes. The document (Ex. A) ran as follows:—

"Deed of partition executed on 25th November, 1895, amongst us living in Thannirkunnam, Mannargudi Taluk, *viz.*, (1) Muthu Odayar, son of Subramania Odayar Avergal, Malaiyamar, Saivite Mirasdar; (2) Balasubramania Odayar, son of Kuppu Odayar Avergal, deceased, who is the son of the said Subramania Odayar Avergal by his senior wife; (3) Singaravelu Odayar, son of Samu Odayar, deceased, and grandson of the said Subramania Odayar's younger brother Ramu Odayar; (4) Somasundara Odayar, son of the above person; (5) Sivasami Odayar; (6) Gopalaswami Odayar—the other sons of Samu Odayar; (7) Gopalaswami Odayar aforesaid, the guardian and father of his minor son Vijiaraghunathan, (8) Singaravelu Odayar aforesaid, the guardian and junior paternal uncle of the minors Balaguruswami and Balakrishnaswami, who are the grandsons of the said Samu Odayar and sons of Ayyadurai Odayar, deceased; and (9) Sivavadivelu Odayar, grandson of the said Subramania Odayar's elder brother Sinnu Odayar and the adopted son of Sendalangara Odayar, deceased. In consideration of the fact that disputes might arise in our family in connection with partition and heavy loss might be sustained thereby, of the fact that the said Samu Odayar and his father Ramu Odayar aforesaid had been very prominent members of our family, carried on business, etc., acquired properties by hard work, and brought our family to a very prosperous condition, of the fact that towards the said Samu Odayar's heirs—*viz.*, Singaravelu Odayar, Sivaswami Odayar, Gopalaswami Odayar, Balaguruswami and Balakrishnaswami—the rest of us have natural affection, and of the fact that the other members have affection towards the said Balasubramania Odayar, the partition arrangements we have come to amongst us are as follows:—

1. Of our family properties, Balasubramania Odayar shall take one-fifth share, and the remaining four-fifths share inclusive of Muthu Odayar's share (1) Singaravelu Odayar and Somasundara Odayar, (2) Sivaswami Odayar, (3) Gopalaswami Odayar and Vijiaraghunathan, (4) Balaguruswami and Balakrishnaswami, sons of Ayyadurai Odayar, and (5) Sivavadivelu Odayar —these shall divide off in equal shares, that is to say, in five equal shares.

2. (Paragraph 2 sets out the properties belonging to the family, the amount of kist, etc. The total kist is given as Rs. 15,531-5-0, the extent of the land is given as 3464 acres 58 cents.)

3. Out of the said properties, the sharers other than Balasubramania Odayar of us shall, for their four-fifths' share, take the immoveable properties specified in List A hereunto annexed,

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etc., and the outstandings, with interest, mentioned in List C; and Balasubramania Odayar of us shall, for his one-fifth share, take the immoveable properties specified in List B, etc. And they (the sharers) shall enjoy them with all rights, from son to grandson and so on in succession, with power to make alienations by way of gift, exchange, sale, etc.

4. (Paragraph 4 makes provision for the enjoyment of the properties left out in Schedules A and B.)

5. (Paragraph 5 provides that out of the moveable properties belonging to the family Balasubramania Odayar received for his share Rs. 35,000 in the shape of paddy, cash, etc., and his claim was discharged and it further provides that Balasubramania Odayar is not liable for the debts contracted by the other members of the family and the other members are not liable for the debts contracted by Balasubramania Odayar.)

6. Inasmuch as, for the reasons that Muthu Odayar of us has natural affection towards Samu Odayar's heirs, *viz.*, Singaravelu Odayar, Gopalaswami Odayar, Balaguruswami and Balakrishnaswami, and for the reason that they might get a smaller share and for various other reasons, Muthu Odayar of us has given away to them his share in the family properties as he has no heirs and as he is advanced in age, the rest of us to the exclusion of Balasubramania Odayar, shall, during the life-time of said Muthu Odayar, live as members of one family. After Muthu Odayar, partition shall be effected according to the shares given in paragraph 1 hereof. The said Muthu Odayar shall, during his life, be at perfect liberty to utilise, as he pleases, a sum of Rupees Four thousand per annum from and out of the income from the four-fifths share of properties aforesaid.

7. Gopalaswami Odayar of us shall perform the obsequies of Muthu Odayar as the son to a father. If, after the life-time of said Muthu Odayar, his wife Alamelu Achi does not find it convenient to live amicably in the family consisting of the sharers other than Balasubramania Odayar of us, the other sharers shall pay to her during her life, maintenance at the rate of Rs. 200 (Two hundred) per annum. If the other sharers aforesaid should effect a division amongst themselves, a sum of Rs. 2,500 (Two thousand five hundred) shall, from and out of the said four-fifths share of properties, be deposited as principal with Gopalaswami Odayar of us; and he shall, for the interest thereon, pay to the said Achi Rs. 200 per annum as stated above. The said Gopalaswami Odayar shall himself perform the said Achi's obsequies, and shall, after the life-time of the said Achi, take also the sum of Rs. 2,500 aforesaid.

8. So long as the sharers other than Balasubramania Odayar of us remain joint without effecting a division according to the shares mentioned in paragraph 1 hereof, the family shall be

regarded as if it were an ordinary undivided Hindu family subject to the law of survivorship.

9. If anything happens to be sold in the village of Thannirkunnam comprised in the said Lists A and B, which is our own place, and that an important one, out of the villages belonging to our family in Mannargudi Taluk, the same shall be sold to, and purchased by, any person from amongst ourselves. Hereafter, there shall be only friendship between Balasubramania Odayar and the other sharers but no monetary relationship. The amount mentioned in page 18 hereof as having been received by Balasubramania Odayar of us and thus discharged, the other amount of outstandings mentioned in the said page as due in the names of the other sharers and Kuppu Odayar, the other moveable properties, etc., and the amount given in List C and the interest thereon—these, all told, are below Rs. 1,75,000.

(Attested by ten persons.)"

It will be clear from the terms of the document that Balasubramania Odayar immediately separated from the family with one-fifth share, Muthu Odayar relinquished his share in the properties and the remaining properties were divided into 5 shares; the other members were divided into 5 groups and each group was allotted a share (paragraph 1). It was further provided (paragraph 6) that during the life-time of Muthu Odayar, the parties should live together, that after his death, if and when they wanted to divide, they should take according to the shares fixed in paragraph 1, and that (paragraph 8) so long as they remained joint, they should be subject to the law of survivorship. The document was subsequently acted upon by the parties in the sense that the other members continued for all practical purposes as members of one family and there were several documents which showed they so treated themselves. On the other hand, certain properties were subsequently purchased in the name of the individual members of the family.

The plaintiff was born in 1898 about three years after Ex. A. Muthu Odayar died in June, 1903, without issue: Sivavadivelu Odayar in August, 1903 and Sivaswami Odayar in 1909 leaving behind him his widow, the 9th defendant in the suit. Singaravelu Odayar died in May, 1917, having before his death adopted the 6th defendant.

The plaintiff brought the present suit in 1919. He alleged that out of the three original branches, the second branch had become extinct, that the others had continued joint in spite of Ex. A, and, as the sole representative of the branch, he was entitled to a half-share of the entire properties. The 1st defendant contended that the effect of Ex. A was to create a division in status and that the clause in paragraph 8 of Ex. A providing for survivorship was inoperative in law and that the parties were

each entitled to one-fifth share only. He further contended that he was entitled to the share of Sivaswami Odayar as his full brother, after the 9th defendant, to the exclusion of the other defendants, who were the descendants by another wife. Defendants 3, 5 and 7 contended that the plaintiff was not entitled to a half share but only to one-fourth, that out of the remaining three-fourths, defendants 1 and 2 were entitled to one share, defendants 3, 4, 5, 7 and 8 to one share and the 6th defendant to one share. The 9th defendant alleged in her statement that by virtue of Ex. A, the parties had become divided, that on her husband's death, she became entitled to her husband's share in the properties.

The Sub-Judge held that the deed operated as a division in status. He held the words of the deed were so plain and unambiguous that it was unnecessary to consider the subsequent conduct of the parties, that where a deed contained two clauses inconsistent with one another, the former alone should prevail, that no coparcenary could be created by contract and that as the devolution by survivorship meant the exclusion of female heirs, the clause providing for such a mode of devolution was inoperative in law. He also held that the plaintiff was estopped from questioning the validity of Exhibit A, as a *bona fide* settlement of family disputes. that he was not entitled to an account of his share during his minority as he had participated in the income of the family and that as he belonged to a different branch altogether, he was not entitled to any portion of the property of Sivaswami Odayar which lapsed in favour of the members only of that branch. In the result, the plaintiff was held entitled to one-fifth share, defendants 1 and 2 to one-fifth, defendants 3, 4, 5 and 7 to one-fifth, defendant 6 as the son of Sivavadivelu to one-fifth and defendant 9 as the heir to her husband to one-fifth.

Two appeals were filed, A.S. No. 439 of 1925 by the plaintiff and A.S. No. 411 of 1925 by defendants 3, 4, 5, 6, 7 and 8. There was also a third appeal, A.S. No. 6 of 1926 by certain lessees who were impleaded in the suit but that is not material for purposes of the report.

In the view their Lordships took about the document, it became unnecessary for them to consider the question raised in A.S. No. 411 if a coparcenary could be created by act of parties. Only the main contentions of the parties in A. S. No. 439 are therefore outlined below.

The Advocate-General (with *K. Narasimha Aiyangar* and *S. Venkatesa Aiyangar*) for plaintiff.—The family continued joint in spite of Ex. A. The scheme of the document and the subsequent conduct of the parties support this view. Questions regarding status admit of no anomaly. Either it was a joint family or it was not. If it was divided, the plaintiff is entitled to an account

of his share during his minority. The incidents of a divided status, comprising the rule of separate succession, the liability to account, etc., cannot be put an end to by the parties.

On the other hand, if the family continued joint, the plaintiff is entitled to a half share. The parties are not entitled to interfere with the incidents of a joint family, rule of survivorship, fluctuation of shares and the computation of shares by the application of the rule of *per stirpes*.

One co-owner in receipt of the income from the common property is liable to account to the others for their share of the income. See *Henderson* v. *Eason*[1]; per Sadasiva Aiyar, J., in *Sivanarasa Reddi* v. *Doraiswami Reddi*[2]; Lindley on Partnership, p. 35 and *Yerukola* v. *Yerukola*.[3]

Even if it be a joint family, the manager is still liable to account for moneys received. See *Arumilli Perrazu* v. *Subbarayudu*.[4]

K. S. Krishnaswami Aiyangar (with *S. Ramanujam* and *S. Panchanada Mudaliar*) for 6th defendant.—The family became divided in status on the date of Ex. A. See *Appovier* v. *Rama Subba Aiyan*,[5] *Girja Bai* v. *Sadashiv Dhundiraj*,[6] *Syed Kasam* v. *Jorawar Singh*[7] and *Parbati* v. *Naunihal Singh*[8].

The document must be given effect to in all its entirety. It is a family settlement contemporaneously made and acted upon by all parties. See *Brijraj Singh* v. *Sheodan Singh*.[9] It is also a contract for consideration entered into by persons *sui juris*. See *Lakshmi Chand* v. *Anandi*.[10]

An absolute estate *in praesenti* defeasible immediately on the end of a life in being is valid in law, and does not offend the rule against perpetuity or any cannon of Hindu Law. See *Sreemutty Kristoromoney Dossee* v. *Norendro Krishna Bahadoor*[11] and *Lakshminarayana Nainar* v. *Valli Ammal*[12] and *Muthuraman Chettiar* v. *Ponnuswami Odayar*[13]. That is what the parties here have provided for by stipulating for the rule of survivorship.

K. V. Krishnaswami Aiyar (with *T. R. Srinivasa Aiyangar*) for 14th respondent, the Official Assignee of Madras, representing the estate of the 4th defendant, argued that there was no in-

1. (1851) 17 Q.B. 701.
2. (1918) I.L.R. 41 M. 861 at 869: 35 M.L.J. 272.
3. (1922) I.L.R. 45 M. 648: 42 M.L.J. 507 (F.B.).
4. (1921) L.R. 48 I.A. 280: I.L.R. 44 M. 656 at 663: 41 M.L.J. 33 (P.C.).
5. (1866) 11 M.I.A. 75.
6. (1916) L.R. 43 I.A. 151: I.L.R. 43 C. 1031: 31 M.L.J. 455 (P.C.).
7. (1922) L.R. 49 I.A. 358: I.L.R. 50 C. 84: 43 M.L.J. 676 (P.C.).
8. (1909) L.R. 36 I.A. 71: I.L.R. 31 A. 412: 19 M.L.J. 517 (P.C.).
9. (1913) L.R. 40 I.A. 161: I.L.R. 35 A. 337: 25 M.L.J. 188 (P.C.).
10. (1926) L.R. 53 I.A. 123: I.L.R. 48 A. 313: 51 M.L.J. 52 (P.C.).
11. (1888) L.R. 16 I.A. 29: I.L.R. 16 C. 383 (P.C.).
12. (1910) I.L.R. 34 M. 250.
13. (1915) 29 M.L.J. 214.

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compatibility or inconsistency in such a contract and cited the analogy of impartible estates.

S. Varadachariar (with *N. A. Krishna Aiyar*) for 1st defendant.—Ex. A cannot be entirely ignored nor is it legally possible to give full effect to it. The only legal effect of Ex. A was to create a division in status and the subsequent clause for the devolution of property by survivorship was beyond the competence of the parties and so inoperative in law. There can be no question of reunion of which, even if possible, there is here no pleading or proof. The effect of the separation of one member on the status of the remaining members has been considered in several cases. See *Balabux* v. *Rukhmabai*,[14] *Palani Ammal* v. *Muthuvenkatachala Moniagar*[15], in the High Court, *Palani Ammal* v. *Muthuvenkatachala Maniagarar*[16] and *Durga Dei* v. *Balmakund*.[17] Unlike those cases the shares were specified here to fix their claims once and for all and not merely as incidental to the computation of the share of the outgoing member.

The plaintiff is not entitled to claim the benefit of survivorship on the death of Sivaswami Odayar as he belongs to a different branch.

Sir C. P. Ramaswami Aiyar (with *T. V. Ramanatha Aiyar*) for 9th defendant adopted the arguments of S. Varadachariar.

R. Gopalaswami Aiyangar and *K. S. Desikan* for party respondent (13th respondent in A.S. No. 439).

M. Ranganatha Sastri for 2nd defendant (2nd respondent in A.S. No. 439).

S. Ramaswami for 5th defendant (2nd appellant in A.S. No. 411).

R. Rajagopala Aiyangar and *S. V. Venugopalachariar* for 10th defendant (4th respondent in A.S. No. 411).

(*Cur. adv. vult.*)

The Court delivered the following

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JUDGMENTS. *The Chief Justice*.—These are three linked appeals, namely, Appeal No. 411 of 1925, Appeal No. 439 of 1925 and Appeal No. 6 of 1926. Of these, Appeal No. 439 of 1925 was argued first as in that the main and the most important contentions between the parties had be considered. I propose in my judgment to deal with all the three appeals together.

All these appeals arise out of O.S. No. 67 of 1919* in the Court of the Subordinate Judge of Kumbakonam. That was

14. (1903) L.R. 30 I.A. 130: I.L.R. 30 C. 725 (P.C.).
15. (1924) L.R. 52 I.A. 83: I.L.R. 48 M. 254: 48 M.L.J. 83 (P.C.).
16. (1917) 33 M.L.J. 759 at 762, 778.
17. (1906) I.L.R. 29 A. 93.
*Subsequently renumbered as O.S. No. 22 of 1924.

a suit for partition. The parties to the suit were all members of an undivided Hindu family related to one another in the manner set out in Schedule A to the plaint. This Hindu family was possessed of considerable immoveable property and in the partition suit the plaintiff claimed a half share in the whole property. The plaintiff stands by himself representing one branch of the family. The genealogical table (Schedule A) shows that all the parties to the suit trace their descent back to one Sepperumal Odayar; and in the judgment of my learned brother Curgenven, J., the genealogical table* has been described in detail and therefore it is unnecessary for me to explain any further how the parties stand in relationship to one another.

In the Court below a preliminary decree was passed by means of which the plaintiff was given one-fifth share, defendants 3, 4, 5, 7 and 8 one-fifth share, the 6th defendant one-fifth share, the 9th defendant one-fifth share, and defendants 1 and 2 one-fifth share. The learned Subordinate Judge gave a decree for an account and also directed that the accounting was to be upon the basis of an undivided family although he found that the family had become divided in status by reason of a document, Exhibit A. This document has been the cause of all the trouble in the suit. Various constructions have been placed upon it by the contending parties both here and in the Court below and these appeals depend entirely upon what view we take of that document. In order that it can be better understood we have to go back to the year 1895. Exhibit A is dated the 25th November of that year and is described as a deed of partition. On that date there were alive Muthu Odayar who died in 1903, Balasubramania Odayar who died since the suit was filed, Singaravelu Odayar who died in 1917, Somasundara Odayar, his son, who subsequently died leaving a widow the 10th defendant, Sivaswami Odayar, who died in 1909 leaving a widow the 9th defendant, Gopalaswami Odayar and Sivavadivelu Odayar, the grandson of Sinnu Odayar and the adopted son of Sendalangara Odayar who was himself the son of Sinnu Odayar, the son of Sepperumal Odayar, the common ancestor. By this deed Balasubramania Odayar separated himself from the rest of the family and under clause 1 of the deed it was agreed that he should take one-fifth share of the whole property, the remaining four-fifths share being agreed to be allotted in five equal shares to (1) Singaravelu Odayar and

*Set out *ante* at p. 784.

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Somasundara Odayar, (2) Sivaswami Odayar, (3) Gopalaswami Odayar and Vijiaraghunathan, (4) Balaguruswami and Balakrishnaswami, and (5) Sivavadivelu, father of the plaintiff. In Exhibit A his adoption by Sendalangaram is recognised and the learned Judge in the Court below has found that adoption proved. The consideration for this document is set out in the preamble to it and is stated to be the fact that disputes might arise in the family in connection with the partition and heavy loss might be sustained thereby, that Samu Odayar and his father Ramu Odayar (Nos. 4 and 11 in the genealogical table) had acquired properties by hard work and brought the family to a very prosperous condition and the natural affection towards his heirs, namely, Singaravelu Odayar, Sivaswami Odayar, Gopalaswami Odayar, Balaguruswami and Balakrishnaswami and also towards Balasubramania. Under clause 6 of the document Muthu Odayar gave away his share in the family properties as he had no heirs and was advanced in age; but there is a reservation that during his life-time he should be at liberty to utilise a sum of Rs. 4,000 per annum out of the income from the four-fifths share of the properties (ascertained in clause 1). Another clause of importance is clause 3 which provides that the sharers are to take the immoveable properties specified in List A and the outstandings in List C and that Balasubramania the outgoing member is to take the immoveable properties specified in List B. Clause 6 must again be referred to here as it is there provided that the sharers (as ascertained in clause 1) are during the life-time of Muthu Odayar to live as members of one family and that after him partition of the property is to be effected according to the shares given in clause 1. Then comes clause 8 which reads as follows:—

"So long as the sharers other than Balasubramania Odayar of us remain joint without effecting a division according to the shares mentioned in paragraph 1 hereof, the family shall be treated as an ordinary undivided Hindu family subject to the law of survivorship."

It is this clause that has given rise to the whole of the trouble. In the absence of such a clause it would be a very difficult task for the plaintiff to contend that Ex. A did not effect a division in status between those members of the family who were parties to it, Balasubramania of course going out altogether and having by the deed separated himself entirely from the family. The construction of Ex. A would then, in my view, have been quite a simple matter and it would have been that the family agreed to divide in status according to certain shares but to live together until the death of Muthu Odayar. The case would then, in my view, have been a plain sailing.

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But there is clause 8 and this has enabled the Advocate-General on behalf of the plaintiff to contend that there was no division in status created by Ex. A and that Ex. A must be ignored altogether and the family dealt with in the partition suit as an undivided Hindu family subject to none of the provisions of Ex. A. This, he contends, entitles the plaintiff to a half share of the family property upon a division. Alternatively he argues that clause 8 is so inconsistent with the other clauses in the document that it alone must be applied. On the other hand it is contended by Mr. Varadachari for the 1st defendant that, if clause 8 is inconsistent with clause 1, then the former must be cut out and the parties governed by clause 1. Mr. K. S. Krishnaswami Aiyangar for the 6th defendant contends that full effect must be given to Ex. A, that its provisions are not inconsistent with one another and that both clause 1 and clause 8 can be taken together and a meaning given to the document. In this contention he is supported by Mr. K. V. Krishnaswami Aiyar for the 14th respondent. The conflicting contentions of the parties, therefore, may be briefly stated as follows:—The plaintiff wishes to ignore Ex. A altogether and treat the family as an undivided family and the defendants contend for the position of a division in status brought about by Ex. A and an agreement under it to live as if the family were an undivided family but not really an undivided family and an agreement to divide by metes and bounds at a later date in accordance with the shares as ascertained in clause 1 of the document. Mr. Varadachari and Mr. K. S. Krishnaswami Aiyangar, however, do not go the whole way together in that argument. The latter argues that clause 8 is not repugnant in any sense and that what it means is that although the family is a divided family it is to be treated as if it were an undivided family and as if the members of it at the time of the execution of the document had agreed together to dispose each of their shares to the others in the event of their dying without male issue. Mr. Varadachari, on the other hand, contends that there could be no such disposition in law or in fact and that clause 8 itself is repugnant to the rest of the other clauses in the document. The Advocate-General also contends that the evil of this clause is that it is an agreement to alter the ordinary rule of succession and, therefore, is quite inconsistent with the position of a division in status which creates a tenancy-in-common because it is provided that the property is to go by survivorship instead of by inheritance as it would do in the case of a tenancy-in-common. The learned Subordinate Judge having held that

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under clause 1 of Ex. A there was a disruption of the joint family and, therefore, a tenancy-in-common says that clause 8 creates a coparcenary with the rights of survivorship, and where there is a disruption of the coparcenary the right of survivorship is gone and that a coparcenary is purely a creature of law and cannot be created by the act of parties. He has, therefore, held that clause 8 is wholly inconsistent with the scheme of division set out in the previous paragraphs and has rejected clause 8 on the ground that where there are two clauses in a deed which are wholly inconsistent with and irreconcilable to each other the former prevails. He has further held that clause 8 relating to the right of survivorship prevents the devolution of property to female heirs and is void since it alters the line of succession allotted by the Hindu Law.

We have first of all to consider whether the claim to a half share in the property now put forward by the Advocate-General can possibly be sustained. If a document is unambiguous in its terms, then little difficulty arises. So far as the terms of the document itself are concerned, it is contended by the learned Advocate-General and Mr. Varadachari that it is impossible to hold that they are unambiguous; and we have been addressed at great length for very many days as to the meaning or possible meaning or impossible meaning of its provisions. It is obvious that when clause 8 is contrasted with the other clauses, they are, without a consideration of the intention of the parties, irreconcilable. We have therefore to see whether we can gather from this document what the intentions of the parties to it were coupled with their conduct subsequent to it as it is the duty of the Court to give effect to a document if it possibly can. The Advocate-General invites us to reject the document altogether except as bringing about the separation of Balasubramania from the rest of the family. But I am unable to agree with the suggestion put forward by him that all that was intended by the parties to this document was by it merely to separate Balasubramania from the rest of the family. To begin with in the preamble it is stated:

"In consideration of the fact that disputes might arise in our family in connection with partition and heavy loss might be sustained thereby."

It cannot, in my view, have been intended by this merely to refer to disputes between Balasubramania and the other members of the family as it seems to me obvious that it refers to possible disputes between all the members of the family on a partition. Then again in clause 1 the remaining four-fifth

shares are divided up into five equal shares and allotted to groups 1 to 5. If the document was merely entered into for the purpose of separating Balasubramania from the rest of the family, it was unnecessary to deal with any of the remaining four-fifths share by dividing them equally into five shares. All that it was necessary to do was to give Balasubramania his one-fifth share and let him go out. Then under paragraph 6 Muthu Odayar gives up his share in the family having no heirs and being advanced in age; and there is the provision already referred to that the other sharers are during his life-time to live as members of one family and after his death to effect a partition. The parties to the document must have had some intention when they made that arrangement. Having ascertained the shares in clause 1, in clause 6 not only do they agree after Muthu Odayar's death to effect a partition but to effect it according to the shares as ascertained in clause 1. Then in clause 8 a division according to the shares mentioned in clause 1 is referred to. Therefore, in my opinion, it is impossible to hold that the intention of the parties by this document was merely to separate Balasubramania. The document must be given a meaning. There appear to be two possible alternatives, namely, that the parties intended by this document to divide in status but to remain, although divided in status, as an undivided family and after Muthu Odayar's death to effect a division by metes and bounds in accordance with the shares agreed upon by clause 1, that they recognised that by executing Ex. A they were dividing in status but wished to live together as one family until Muthu Odayar's death and that they decided that during that time and until they did effect a partition by metes and bounds the rule as to the devolution of property in a Hindu undivided family should apply. The other possible alternative is that they did not intend to divide themselves in status by Ex. A, that all they intended to do was to postpone a division until some future date and that when they did divide the division was to be in accordance with clause 1 of the document. But before the latter alternative is considered, we have to consider whether the execution of Ex. A, quite irrespective of what the intentions of the parties might be, did bring about a disruption of status and upon this point there are some cases which have to be considered. The first of these is *Appovier's case—Appovier* v. *Rama Subba Aiyan*[1], a decision of the Privy Council. There it was held that according to the true constitution of an un-

1. (1866) 11 M.I.A. 75.

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divided Hindu family no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property, that he has a certain definite share. The proceeds of undivided property must be brought to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of the family. But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and each member has thenceforth a definite and certain share in the estate which he may claim to receive and enjoy in severalty, although the property itself has not been actually severed and divided. Where, therefore, a deed of partition was made and executed by the other members of an undivided family, dealing with and making actual partition of a portion of the joint estate but leaving the remainder to be divided at a future period in the same manner such deed was held to be a division of right operating as a conversion of the tenancy and a change of status in the family so far as the property specified (was concerned) changing as it were the joint tenancy thereof into a tenancy-in-common and by operation of law making the members of the previously undivided family a divided family in respect of such property. At page 89 Lord Westbury in delivering the judgment of the Judicial Committee states as follows:—

"Certain principles, or alleged rules of law, have been strongly contended for by the appellant. One of them is, that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds. Their Lordships do not find that any such doctrine has been established; and the argument appears to their Lordships to proceed upon an error in confounding the division of title with the division of the subject to which the title is applied. According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector or receiver of the rents, a certain definite share."

He then proceeds to say that the members of an undivided family can agree amongst themselves that the property shall be the subject of ownership in certain defined shares and this alters the character of undivided property, that joint enjoyment is taken away from it and the member has a right to claim

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to receive and enjoy it in severalty and that by such an agreement therefore the joint tenancy is converted into a tenancy-in-common. In *Balabux* v. *Rukhmabai*[2] the Privy Council held that there is no presumption when one coparcener separates from the others that the latter remain united, that where it is necessary, in order to ascertain the share of the outgoing coparcener, to fix the shares which the others are or would be entitled to, the separation of one may be said to be the virtual separation of all and that an agreement amongst the remaining coparceners to remain united or to reunite must be proved like any other fact. There can be no question in this case of any agreement to reunite as there were minors in existence and such minority renders any such agreement impossible. The importance of this decision lies in its placing the burden upon those who maintain that there has been no division in status of displacing the presumption which this judgment holds arises. In a later case *Parbati* v. *Naunihal Singh*[3], another decision of the Privy Council, it was held that where one member of the family effects a separation of himself from the family and where the ascertainment of the shares of the remaining members of the family is merely incidental to that one member's separation, the presumption is that the other members remain undivided. Both *Appovier's* case and the case in *Balkishen Das* v. *Ram Narain Sahu*[4] were considered and the principles laid down in them followed but it was stated that the High Court had proceeded in an erroneous method in considering whether each document was by itself sufficient to rebut the *prima facie* presumption that as the family was joint before 1861 it continued to be joint, and omitting to take into account the cumulative effect of all the documents which taken together showed that all the transactions for many years could only be reconciled and made consistent on one hypothesis, namely, that the important document was a genuine document and the agreement in it embodied a real agreement. There, after the death of one of the members of the joint family in 1861 the other members mutually agreed that the joint property should thenceforth be held and enjoyed by the various members of the family in certain defined shares which they specified in a petition to the Collector to have their names entered to that effect in the official papers of the village. This was done, the petition was filed and it was held that on the evidence and in the circumstances of the

2. (1903) L.R. 30 I.A. 130: I.L.R. 30 C. 725 (P.C.).
3. (1909) L.R. 36 I.A. 71: I.L.R. 31 A. 412: 19 M.L.J. 517 (P.C.).
4. (1903) L.R. 30 I.A. 139: I.L.R. 30 C. 738 (P.C.).

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case a partition of the property had been effected in 1861 and that the transactions and conduct of the members of the family with respect to the management of the property had been on the basis that it was held in separate shares from that time. In a later case, namely, *Palani Ammal* v. *Muthuvenkatachala Moniagar*[5], the Privy Council held that when a member of a joint family has separated, an agreement by the remaining members to continue undivided may be inferred from the way in which their business is carried on after the separation. On page 257 it is stated in the judgment:

> "In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves, is now well-established law."

Then a reference is made to *Appovier's* case and it proceeds:

> "But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be."

The result seems to me to be that where the ascertainment of the shares of the remaining coparceners is merely incidental to the separation of one of them, no presumption arises that the family hitherto undivided has become divided. The High Court judgment in this case is reported in *Palani Ammal* v. *Muthuvenkatachala Maniagarar*[6]. On page 780 Kumaraswami Sastri, J., after reviewing a number of authorities upon the question of whether the separation of one member *ipso facto* effects a separation between all the others, stated his opinion to be that where the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants (as it is not possible to arrive at the share of one coparcener without knowing how many coparceners there are and their shares) and the status of the others is unaffected by a decree or division in favour of one member.

Syed Kasam v. *Jorawar Singh*[7] is another case to which we were referred. There a member of a joint Hindu family governed by the Mitakshara claimed his share of the family

5. (1924) L.R. 52 I.A. 83: I.L.R. 48 M. 254: 48 M.L.J. 83 (P.C.).
6. (1917) 33 M.L.J. 759.
7. (1922) L.R. 49 I.A. 358: I.L.R. 50 C. 84: 43 M.L.J. 676 (P.C.).

property and the members of the family agreed to appoint an arbitrator to partition the property among them and to accept his partition and it was argued that this agreement to appoint an arbitrator effected a severance of the joint estate. This contention the Privy Council accepted and at page 92 Viscount Cave states as follows:—

"It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree."

But the facts of this case are very different to those in that case on account of clause 8 of the present agreement. Whilst that remains, it seems to me that it cannot be held that the ascertainment of the shares of the coparceners in the earlier clauses of it necessarily brings about a division in status. It seems to me that in all the cases to which we were referred upon this point, upon the facts of them that a present intention to divide in status was apparent. In this case, as I have already said, in the absence of clause 8, such an intention is discoverable. But effect has to be given to this agreement, and to clause 8, unless it can be shown that whatever the intention of the parties to the agreement may have been, the ascertainment of the shares of the remaining members of the family must in law operate as a division in status. No authority for this proposition has been put before us and I am clearly of opinion that such a proposition as that cannot be supported by reference to any of the cases referred to. One fact must not be overlooked and that is that Ex. A was drafted by a vakil and it is hardly likely that he would have drafted a document intending in the earlier part of it to convert the estate into a tenancy-in-common and yet in the latter part of it to preserve the coparcenary. He cannot have intended to disrupt the status of the family and yet to apply the principle of survivorship to it. This would, in my view, have created an impossible position. What, therefore, was it that the parties intended? It was contended before us that the wishes of Muthu Odayar were intended to be given effect to and they were that the family should remain an undivided family during his lifetime. He was an old man and willing to give up his share in the family property to the others. I think that this contention is well founded and that in deference to Muthu Odayar's wishes the family agreed to remain undivided during his lifetime and had no present intention at the date of the execution of Exhibit A to divide in

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status at all. Clearly there had been disputes in the family. The adoption of Sivavadivelu was open to question and in Exhibit A that matter was set at rest. There were also other matters which required adjustment and there is nothing unreasonable in supposing that when the parties came together for the purpose of dividing themselves from Balasubramania, they took that opportunity of settling once and for all, all the matters then in dispute and likely to cause disputes thereafter—indeed it is so stated in the document—that there never was any intention to become divided in status but that they agreed to a future partition and that when the occasion for it should arise there should be no dispute as to the shares of the coparceners on such a partition. No other view of the intention of the parties seems to me possible and I have no difficulty in thinking that such was the intention. That such was the intention of the parties was nobody's case in the appeal but the comment to be made upon that is that all the parties to the appeal were trying to get a larger share of the family property and that this case suited no one. The view that I have taken is strongly supported by the subsequent conduct of the family. They continued to live as an undivided family throughout and it was not suggested that there was any documentary evidence faintly suggesting a previous division in status except Exhibit VI (*a*), a letter addressed to the Chairman, Municipal Council, Kumbakonam, and signed by Sivaswami Odayar. Certain voters took exception to the candidature of Sivaswami Odayar at the Municipal Elections because Sivavadivelu was already a Municipal Councillor and the rules framed by Government allowed only one member of an undivided Hindu family to be registered as a person qualified to be elected or to vote and it was therefore claimed that the nomination of Sivaswami Odayar should be rejected and Ex. VI (*a*) represents Sivaswami Odayar's answer to this objection. Whilst setting out other answers the following answer is given:—

> "Even admitting for the sake of argument that the rule referred to is capable of the interpretation put upon it by the petitioners our family might for the purpose of this objection be legally considered as a divided one under the terms of a registered document entered into among the members thereof, dated the 25th November, 1895. Each member is therefore entitled to have his name registered separately provided he possesses the requisite qualifications."

This answer is by no means definite. Certainly it does not unequivocally state that the family was a divided one; on the contrary it seems to admit that it is not but ought for the purpose of the objection to be considered as such. I cannot

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take this answer as in any way indicating that the family considered that a division had taken place by means of Ex. A. This is the only document which by any possible stretch of imagination can be said to support the respondent's case. On the other hand there are a number of documents which indicate that the family remained undivided. In Ex. D, a petition, dated 1904, Sivavadivelu is described by the 1st defendant as his undivided brother. Ex. KK is the written statement filed by Singaravelu Odayar in O.S. No. 42 of 1908 in the Sub-Court, Kumbakonam, and in paragraph 4 of it it is stated:

"Myself, the defendants 8 to 11 and the deceased Sivaswami Odayar are members of an undivided family."

Sivaswami Odayar died in 1909 before this written statement was filed. Then again in paragraph 9 it is stated:

"The said Sivaswami Odayar and ourselves were members of an undivided family."

This written statement was adopted by Gopalaswami Odayar, the 8th defendant in that suit, for himself and as guardian of the minor 11th defendant and also by Balaguruswami Odayar and Balakrishna Odayar. Written statements in O.S. No. 132 of 1917 in the Court of the Additional District Munsif of Tiruvarur were also filed of which Exhibit C-13 is an example and there also Gopalaswami Odayar stated that the 2nd defendant in that suit was his undivided brother. There are other documents, such as Exhibits CC, CC-1 and PP, which are quite incompatible with any other position than that of an undivided family.

Much was addressed to us in argument upon the meaning of the words in clause (8) "the family shall be treated as an ordinary undivided Hindu family." It was contended that the use of the word "treated" implied that the family was not actually an undivided family because "treated" is to be read as "deemed" but although upon a strict construction of the word "deemed" it may possibly imply something different to actual, I do not think that when the whole of the clause is read, it means anything else than an actual ordinary undivided Hindu family. The Vakil who was responsible for drafting the document cannot have intended to say that a tenancy-in-common was nevertheless to "be deemed to be an undivided Hindu family subject to the law of survivorship." I think that it is more probable that he had in mind the possible result of the earlier ascertainment of the shares of the members of the family and that in clause (8) he decided to make it clear that there had been no division

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in status by that ascertainment and so emphasised the retention of the undivided status in order to remove any possible misconception. This is the conclusion I have arrived at as to the construction of Exhibit A and, in my view, it cannot be argued that it is not binding upon the plaintiff. It is an agreement which, in the absence of any authority to the contrary, can be validly entered into and was entered into by his father Sivavadivelu and was an agreement between all the adult members of the family. There was certainly consideration for it in that it settled the dispute between the parties and recognised the adoption of the plaintiff's father and in fact gave him a somewhat larger share than he would have got by reason of such adoption and furthermore there was a relinquishment of Muthu Odayar's share. In view of this finding that there was no disruption in the family on the date of Ex. A even in status and that the family remained undivided, it is unnecessary to deal with the arguments of counsel based upon a division in status effected on the date which Exhibit A bears. On the question of upon what basis the accounts are to be taken, it follows from this decision that it must be on the basis of an undivided family from 5th November, 1917 and following the form in *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar*[8] I have arrived at the same conclusion upon this point as that of the learned Subordinate Judge but of course for different reasons, because he found that Exhibit A did effect a division in status. I agree with the learned Subordinate Judge also in rejecting the plaintiff's claim to past mesne profits in respect of Items C-5 and C-7 against the 27th and 28th defendants as he has found that they were not in adverse possession and I am not inclined to disagree with that finding. The result of this, therefore, is that the appeal must be dismissed with costs. Two sets of costs to respondents. Defendants 1, 2 and 9 in one group and defendants 3, 4 and 6 in the other group. (Defendant 28 does not ask for any costs.)

With regard to Appeal No. 411 of 1925, the only question in that was the construction to be placed upon clause (8) of Exhibit A. That only fell for discussion in the event of our holding that Ex. A effected a division in status and as we have held that it did not, this appeal is not capable of further argument but is allowed to the extent indicated in the judgment of Curgenven, J. Costs of all parties to come out of the estate.

8. (1927) I.L.R. 50 M. 866 at 873: 53 M.L.J. 189.

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Curgenven, J.—These three appeals arise out of a suit for the partition of the joint property of a family of Odayars known as the Thannirkunnam family. This property comprised the whole or portions of several villages in the Tanjore District, as well as moveables and outstandings, the whole amounting, according to the plaint valuation, to some four and a half lakhs.

The following is the family genealogical table. [The table will be found set out in the statement of facts.]

The family lived in a condition of undisputed jointness until 1895, but not without disputes regarding certain matters which will be referred to later. In that year all the adult members subscribed to a partition deed, Ex. A, and it is upon the construction of this document that the first two of the three appeals have to be decided.

The questions to which the document Ex. A gives rise are, firstly, what does it mean, and, secondly, is it binding upon the signatories to it and those claiming under them. Very long and elaborate arguments have been addressed to us upon the former of these two questions, the parties ranging themselves into three main groups, each with its own construction to put forward. How these groups came to be formed, and in what circumstances the document originated, need to be borne in mind in attempting to discover the intention underlying the deed.

The family, as the genealogical table shows, consisted in 1895 of three main branches, those of Sinnu, Subramania and Ramu Odayar. Sinnu's branch depended for its existence upon the fact of the adoption of Sivavadivelu, a member of Ramu's branch, by Sinnu's son Sendalangara. Subramania's branch was represented by two members, Balasubramania and Muthu. The third branch, that of Ramu, included a number of persons, Ramu's son Samu having had five sons. All those defendants who belong to the family are representatives of this branch. Up to 1895, as has been said, the family formed a single coparcenary, although being possessed of extensive property and engaged in various activities its members may have exhibited some external marks of separateness. Some time before the date of Ex. A various disputes arose. One, it is said, had reference to Sivavadivelu's adoption. Another was concerned with the nature of some of the property, whether it was self-acquired or joint. Balasubramania, of the second branch, evinced a desire to get his share divided, while Muthu, of the same branch, was strongly of opinion that the whole family should remain

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joint. It was a question, therefore, whether to agree to his division, and if so, what share he should get. Some of these circumstances will need to be considered again when the binding character of the document is inquired into. It is sufficient to say here that Balasubramania had his way and split off from the remainder of the family; and this seems primarily to have afforded occasion for the deed. At the same time there is no doubt that the opportunity was availed of to compose the other outstanding questions, and to settle once for all how upon a general partition the property was to be allotted.

The document begins by calling itself a deed of partition between the signatories, a description which the cleavage with Balasubramania would in itself justify, and adverts to the danger that disputes might arise in connection with partition and heavy loss be occasioned thereby. Grounds are then found in the services to the family of Ramu Odayar and his son Samu Odayar for giving their branch special consideration. Accordingly, "the partition arrangements we have come to amongst ourselves are as follows." Then follow nine clauses setting forth these arrangements. Of these, the language of clauses (1), (3), (6) and (8) must decide the construction to be placed upon the document. Clause (1) assigns to Balasubramania a one-fifth share and provides as regards the remaining four-fifths that the division is to be into five equal shares—four to go to the four sub-branches of the third branch, and one to Sivavadivelu. Clause (3) defines Balasubramania's share by means of a list, and collects the remaining property, comprising the family property of the remaining members, into two other lists. Clause (6) recites that Muthu Odayar, out of natural affection for Samu Odayar's heirs, and because they would otherwise get a smaller share, gives them his share in the family property, being himself without heirs and advanced in years. In view of this, "the rest of us shall during the lifetime of Muthu Odayar live as members of one family. After Muthu Odayar, partition shall be effected according to the shares laid down in clause (1)." Clause (8) runs as follows:—

"So long as the sharers other than Balasubramania Odayar of us remain together without effecting a division by metes and bounds according to the shares mentioned in clause (1), the family shall be regarded as an ordinary undivided Hindu family subject to the law of survivorship."

The meaning of these clauses, as I have said, has been variously interpreted. The plaintiff, while very willing to avail himself of the document so far as it confirms his father's adoption, contends that clause (8) shows that the family remained

joint and that the specification of shares in clause (1), being repugnant to the notion of a joint family, is invalid. He asks for a half share in the entire remaining property, including that resigned by Muthu Odayar. A directly contrary view is pressed upon us on behalf of the 1st, 2nd and 9th defendants. One of Samu Odayar's sons, Sivaswami, died subsequent to the execution of the document, leaving a widow, the 9th defendant. Of course if the family remained joint she will only be entitled to maintenance. But if Ex. A created a severance of status, the question whether or not she is to take her husband's share will depend upon whether, in spite of that circumstance, the rule of survivorship is to be applied under clause (8). She, therefore, contends for the virtual rejection of this clause. The 1st defendant is the sole surviving full brother of Sivaswami Odayar, and supports the widow in consideration of his reversionary interest. The third group—descendants of Ayyathorai Odayar (defendants 3, 4, 5, 7 and 8) and Singaravelu's adopted son (6th defendant)—contend that although clause (1) may have effected a severance of status, yet it is possible to give legal effect to clause (8) in such a manner as to apply what is, within certain limits, a rule of survivorship. The Principal Subordinate Judge has found in favour of the construction contended for by defendants 1, 2 and 9. This has given rise on the one hand to an appeal by the plaintiff (A.S. No. 439) and on the other an appeal by defendants 3 to 8 (A.S. No. 411).

In approaching the construction of the document, no authority is needed for the principle that every endeavour should be made to ascertain from it, read as a whole, what was the expressed intention of the parties to it. Each part must, if possible, be reconciled to the remainder, because it must be presumed, unless and until such presumption appears to be forbidden by the language, that it was drafted to subserve a consistent purpose and course of action. Observation of this principle would seem to require that those constructions which would reject either clause (1) or clause (8) should, to begin with at least, be put on one side; because it seems clear that the adoption of either must frustrate some part of the intention with which the settlement was executed. There remain two interpretations to consider. The first supposes clause (1) to have effected a division in status, while clause (8) preserves the rule of survivorship. The second, which none of the parties finds it in his interest to support, but which may not be the less worth considering on that account, would construe clause (1) as no more

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than an agreement into what shares the property should be divided after Muthu Odayar's death, and not as evidencing a resolve immediately to sever in status. The clause would then plainly be reconcilable with clause (8).

Dealing with the merits of these two views, it may be conceded that, but for the existence of clause (8), the natural view, and the view supported by authority, would be that a severance of status resulted from the declaration contained in clause (1). So far as the partial partition of Balasubramania's share was concerned, all that was needed was to specify his one-fifth, and to leave the remaining members as an undivided family in possession of the remainder. Without doubt, therefore, a further intention is denoted by the apportionment of the four-fifths remaining into five equal shares. It has been urged that, whether that intention was to divide prospectively or immediately, the mere definition of shares in law converted the joint tenancy of a coparcenary into a tenancy-in-common; because an essential incident of a coparcenary is that no member can predicate what his share would be upon a partition. Before considering the case-law upon this point, a few elementary considerations need to be stated. The members of a coparcenary own their property jointly, and the interest which each member has in it fluctuates with the number of other members, as some are born and some die. It fluctuates by operation of the rule of survivorship, and since that rule is a necessary incident of the status, so must be the liability to fluctuation. Hence abrogation of the rule, rendering the shares fixed, necessarily involves a disruption of the joint status. The members become tenants-in-common, each possessed of individual rights which they may dispose of as individual property. They have substituted the rule of inheritance for the rule of survivorship. But if they retain the rule of survivorship, it is not easy to understand how they can be said to have fixed their shares, because by the terms of their agreement those shares are still subject to the fluctuation produced by the rule operating upon them. Merely to specify, therefore, that on partition the property will be divided according to a certain method, and until then the members will remain joint, would not seem, on first principles, necessarily to precipitate a severance. A simple illustration of the distinction I seek to draw may be given. Suppose four brothers and a cousin (son of a deceased paternal uncle) compose a joint family. Upon a partition, the cousin would take half the property, the primary division being *per stirpes,* and the four brothers would each take one-quarter of the other half. Sup-

pose, however, that these five members come to a settlement whereby they agree that, when a partition takes place, it is to be *per capita* throughout instead of *per stirpes* in the first instance, so that each member would obtain one-fifth, the family in the meanwhile to remain joint. There has been a substitution of one rule for another for the ascertainment of shares, but the shares are not thereby any the more or the less ascertained. Much less has any division of rights been effected. Yet that is very much what has occurred here. What the parties in effect said was, "We will recognise Sivavadivelu's adoption, but when we come to divide we will ignore it, and count this member as though he occupied his natural place as a son of Samu Odayar": though it may be a question how the rule of survivorship should be applied to such an arrangement. I do not think that there is any authority for the view that such an agreement necessarily causes a division of status. The dicta of Lord Westbury in *Appovier's* case, *Appovier* v. *Rama Subba Aiyan*[1], do not apply to such circumstances, because there the family members agreed that thenceforth the property should be subject to ownership in certain defined shares, so that there was a division of rights, although it was not followed up by an actual partition. In *Balkishen Das* v. *Ram Narain Sahu*[4] the members of a joint family executed an *ikrarnama*, and the question was whether it effected a division in status. Their Lordships experienced "no difficulty in the construction of the *ikrarnama*, in which it is stated in unambiguous terms that defined shares in the whole estate had been allotted to the several coparceners," and that they were thereby converted from joint tenants into tenants-in-common. In the present case, assuming the retention of the rule of survivorship, the conversion of the joint tenancy into a tenancy-in-common can scarcely have occurred. Another case in the same line of Privy Council decisions is *Parbati* v. *Naunihal Singh*[3], which related to an agreement by the members of a joint family that the family property should be thenceforth held and enjoyed by the various members of the family in certain defined shares. In deciding that the agreement produced a division in status their Lordships were, I think, more concerned with the construction of the documents evidencing the agreement than with their legal effect, once it was found that an immediate division into shares was intended. The use of the word "thenceforth" will be noted.

1. (1866) 11 M.I.A. 75.
3. (1909) L.R. 36 I.A. 71: I.L.R. 31 A. 412: 19 M.L.J. 517 (P.C.).
4. (1903) L.R. 30 I.A. 139: I.L.R. 30 C. 738 (P.C.).

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Another and not dissimilar case is *Syed Kasam* v. *Jorawar Singh*[9] of some assistance here because of an observation that the agreement was "quite sufficient to effect a severance in interest and to prevent the share of Nain Singh from passing by survivorship". Only by holding that clause (8) of the present agreement cannot operate, can the agreement itself be held to effect such a severance.

I think it will be found that in each of these cases a present intention to divide in status was discovered, and none of them is authority for the view that the parties cannot agree to certain principles of partition, to be applied *in futuro* without becoming tenants-in-common. This in my view disposes of the contention that the family members here, irrespective of their own wishes, and irrespective of the terms upon which they proposed to hold their property until Muthu Odayar's death, must be regarded as severed in status. Before going further, it will be convenient to consider what their actual intention seems to have been. The document was drafted by a vakil, and although unfortunately it has given rise to this costly litigation, it is not unreasonable to suppose that it was drafted with due regard to the principles of Hindu Law. It can hardly be supposed that any one conversant with those principles would draw an instrument of so hybrid a character that in one place it divides status and makes the signatories tenants-in-common, while in another it applies to their property so well understood an incident of the joint family status as the rule of survivorship. It is not too much to say that this rule is the logical outcome of conditions wholly at variance with the incidents of a co-tenancy. If Mr. K. S. Krishnaswami Aiyangar, in his endeavours to reconcile the two things, has convinced me of one thing it is the extreme difficulty of the task which was set him. He had to admit that the survivorship principle could only be applied with modification; and Mr. Varadachariar found no difficulty in suggesting problems and anomalies to which its application would give rise. Let us then see what the members of the family would seem to have desired. One thing is clear—that very great deference was paid to the wishes of Muthu Odayar. He was the only surviving member of his generation, and, as the document says, "advanced in years". His name stands first in the deed. He was to give up his share to the others, and, as the evidence shows, he was most anxious that apart from Balasubramania's separation,

9. (1922) L.R. 49 I.A. 358: I.L.R. 50 C. 84: 43 M.L.J. 676 (P.C.).

which he deplored, the family should remain joint. Doubtless some slur may attach to family members who dispute and divide. It was, therefore, provided that so long as he lived there should be no further partition. I can see no reason to suppose that during his lifetime a division even of status was intended. After all, although such a severance is a familiar enough legal conception in the Courts, the necessity for partition first by status and then by metes and bounds does not very commonly arise in practice. Nor, again, if such was the intention, are the parties likely to have nullified its main legal effect by the addition of clause (8). Accordingly I cannot escape the conclusion that what they wanted was to remain joint until after Muthu Odayar's death while settling how the property should then be divided. I have myself no difficulty in construing Ex. A as an expression of such an intention. It has been asked why, if no immediate division was intended, the parties should have been at pains to declare in clause (8) that "the family shall be treated as (or 'deemed to be') an ordinary undivided Hindu family subject to the law of survivorship"; and stress has been laid on the word "treated" or "deemed" as indicating a consciousness that the family was not in fact joint. No doubt the phrase "deemed to be" is commonly used in statutes to extend the application of a provision of law to a class not otherwise amenable to it. But, as the learned Advocate-General observes, one cannot apply to a mofussil document rules of construction that would be appropriate in the case of a statute. I think the reasonable view to take is that the draftsman, having in mind such decisions on *Appovier's* case and realising that clause (1) might imperil the joint status (a fear, as the sequel shows, not unfounded), inserted clause (8) as a precautionary measure. A case which bears some resemblance to this one was one decided by Krishnan and Ramesam, JJ., in *Venkatachala Pillai* v. *Arunthavathachi*.[10] The second of three brothers was adopted out of the family, the other two remaining joint. All three entered into an agreement to put their property together and live as members of a joint family, and when a division should take place to divide into three equal shares, subject to the operation of the law of survivorship. It fell to be decided whether the agreement had occasioned a severance of status, and there, as here, it was argued that the deed "as a matter of legal consequence, whatever the parties might have intended, resulted in the severance of coparcenary"; but the learned

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10. (1922) 17 L.W. 755.

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Judges observe that the document recited that no party to it was to assert that any portion of the property belonged to him separately or exclusively, and provided for future born children to be made sharers. It was further suggested that the fixing of the shares at one-third each was an indication that a division was intended, and *Balkishen Das* v. *Ram Narain Sahu*[4] was cited in support of this contention. The answer to this, equally applicable I think to the present case, was that the definition of shares amounted to nothing more than a mere statement as to what each person would be entitled to in case of a division if no brother were born.

I should be prepared to hold then that the document is not ambiguous of the intention to remain joint, and is not ambiguously expressed. But conceding that there may be ambiguity, it is permissible to look at the subsequent conduct of the parties to ascertain if it favours the one view or the other.

A number of documents throw light upon this question. The earliest is a petition (Ex. D) filed in 1904 by the 1st defendant asking to be appointed to the Negapatam Devasthanam Committee in the vacancy caused by the death of Sivavadivelu, whom he describes as his undivided brother. Sivavadivelu was of course his natural brother though his cousin brother by adoption. Sivaswami Odayar, who was very largely conducting the family affairs, died in 1909 and his death gave occasion for a number of applications in pending suits. Ex. KK is a written statement filed by Singaravelu Odayar in a suit on a promissory-note in which he was impleaded after Sivaswami Odayar's death. The terms of this statement throughout are only compatible with the existence of an undivided status. The present 1st defendant and the 3rd and 4th defendants adopted this statement in Exs. KK-1 and KK-2. The C series of documents again are compatible only with joint family membership, as for instance Ex. C-4, where the members of family of Sivaswami, claiming to be his coparceners, asked to be brought on for purposes of executing the decree. The widow would of course have been the proper representative had the deceased man not been joint with the other family members. Ex. PP is a promissory-note executed by Singaravelu Odayar in 1911 in renewal of a debt contracted by Sivaswami Odayar, whom he describes as his undivided brother. Ex. CC is an application by Singaravelu Odayar to the Receiver of the Palace Estate at Tanjore to transfer to his undivided younger brother Gopala-

4. (1903) L.R. 30 I.A. 139: I.L.R. 30 C. 738 (P.C.).

swami Odayar (1st defendant) the registry standing in his name of certain lands. The record shows that reference was made to the head karnam who reported that the family was an undivided one. A statement of the same effect is contained in a letter, Ex. CC-1, which the 1st defendant wrote to the Receiver in the same connection. In 1917, a few days before his death, Singaravelu Odayar on behalf of himself, his adopted son and all the members of Ayyathorai's branch sent the remainder of the family a notice Ex. N that they should be held thenceforward to be divided. The notice says:

> "Although yourselves and ourselves have been, till now, living as members of an undivided family, as we think that we should become divided from you, we have become divided from now. You have no right to the properties belonging to our share. In the same way, we have no right to the properties belonging to your share. We strictly inform you that henceforward there shall be between us only relationship by blood, but no interest with regard to property."

Whatever the circumstances in which this notice was issued it contains no allusion to the partition deed of 1895 and expressing as it does an unequivocal intention to become divided in status, it cannot easily be reconciled with the theory that an earlier division of this kind had already taken place. In fact, no further action seems to have been taken and this notice remained as much a dead letter as the suit partition deed itself. I have left to the last the only document which can in any manner be construed as suggesting a divided status. In 1899 Sivaswami Odayar offered himself as a candidate at a municipal election in Kumbakonam and Ex. VI is a protest addressed by a number of voters to the Chairman, objecting to his candidature on the ground that his brother Sivavadivelu was already a municipal councillor and that the rules precluded more than one member of an undivided Hindu family from sitting on the Council. Ex. VI-(*a*) is Sivaswami Odayar's reply. His primary argument is that where in an undivided family the property is sufficient to qualify more than one individual for a seat, the rule referred to had no application. He then goes on to say that admitting that the rule is capable of the interpretation placed upon it by the petitioners, his family "might for the purpose of this objection be legally considered as a divided one under the terms of a registered document entered into among the members thereof, dated the 25th November, 1895". It seems clear to me from the terms of this letter that Sivaswami Odayar's own view was that he was undivided from his brother and that he merely put forward the possible legal effect of the partition deed as a means of gaining his object. If he

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had indeed believed that it divided the status, his reply would surely have been in different terms. From a consideration of all the available documentary evidence therefore I think that no other conclusion is possible but that those members of the family whose views are ascertainable from these documents entertained the view that they were still undivided in status.

My conclusion then is that the family members intended to remain joint until Muthu Odayar's death, while entering into this agreement as to what their shares should be thereafter. I have already expressed the view that an agreement of this nature does not necessarily disrupt the status. Nor has any authority been shown for the position that the members of a joint family are incapable of entering into such an agreement. There is no doubt that at the time of partition the members may by general agreement distribute the property otherwise than as Hindu Law provides, and there seems no reason why such an agreement cannot be entered into beforehand. In the Privy Council case *Lakshmi Chand* v. *Anandi*[11], two brothers, while remaining joint, agreed that, if either died without male issue, his widow should take a life-interest in half the estate, thereby abrogating the rule of survivorship. It was held that the agreement was valid because a co-sharer may with the consent of the remaining co-sharers mortgage or charge the share to which he would be entitled upon a partition; and, on the same principle, he may deal otherwise with such a share. If, therefore, all the family members enter into a settlement whereby some will, upon a partition, receive less than what under Hindu Law would be their share, the latter cannot afterwards plead that they were legally incompetent so to agree. Nor, I think, can the plaintiff succeed in attacking the agreement on the ground that, being without consideration, it is not binding upon him. It was entered into by his father, Sivavadivelu Odayar, before he was born, and although Sivavadivelu lived until 1903 he never repudiated it. So far as the other signatories are concerned it settles the question of his adoption, for which it seems there is extremely little independent evidence—a batch of four sale-deeds (*see* Exs. Z and Z-1) in which this relationship is recited being the only documentary evidence (if indeed they are legal evidence at all) originating before Ex. A upon the record. On the other hand, the evidence of the 1st and 3rd defendants as D.Ws. 18 and 13 shows that there were disputes within the family about the adoption, and this is borne out by two other

11. (1926) L.R. 53 I.A. 123: I.L.R. 48 A. 313: 51 M.L.J. 52 (P.C.).

witnesses, D.Ws. 4 and 5. If Ex. A goes, therefore, the plaintiff's status, following Sivavadivelu's status as an adopted son is at least in jeopardy, and as that would be fatal to the claim he makes to a half share in the property, he does not handle this two-edged argument very confidently. It seems incontestable that Ex. A is binding for the sufficient reasons that it was an agreement between all the adult members of the family, and that it put an end—for the time being at least—to the disputes between them. Besides the matter of the plaintiff's father's adoption, there was the connected question of the share which Balasubramania Odayar was to take. If the adoption was to be recognised he would get one-sixth of the whole, if not, one-fourth. A mean was struck, and he received one-fifth. It appears, too, that there was a disagreement whether certain property was self-acquired by Ramu and Samu Odayar or joint family property, a question which would affect the shares to be taken by each branch. Lastly, the settlement included Muthu Odayar's resignation of his own share, subject to the payment to him annually of a sum of Rs. 4,000. Altogether, there can be no question, but that, just as where a number of creditors accept a composition, so in the general give-and-take and composing of differences Ex. A as a family settlement is binding upon its signatories and those claiming under them.

The result of these findings will be that the undivided share of Sivaswami Odayar will pass by survivorship to the remaining members of his own branch, *viz.*, (1) the descendants of Ayyathorai, defendants 3 to 5, 7 and 8, (2) the 6th defendant as representing his adoptive father Singaravelu, and (3) Gopalaswami and his son, defendants 1 and 2. Each of these will receive one-third of one-fifth share in addition to his or their own one-fifth in all four-fifteenths each, this fraction being further sub-divided in the case of the first branch, equally between the 3rd and 4th defendants' sub-branches. The decree of the Lower Court will be modified accordingly. The plaintiff, belonging to a different main branch from Sivaswami Odayar's cannot benefit by his death, but will take the one-fifth already awarded him by the Lower Court. As regards the other orders to be passed in A.S. Nos. 411 and 439, I agree to the terms of them as proposed by my Lord.

S.R. *A.S. No.* 439 *of* 1925 *dismissed.*
A.S. No. 411 *of* 1925 *allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD BLANESBURGH, LORD MERRIVALE AND LORD RUSSELL OF KILLOWEN.

Raja Probhat Chandra Barua .. *Appellant**

v.

The King-Emperor .. *Respondent.*

P. C.
—
Raja Probhat Chandra Barua
v.
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Bengal Permanent Settlement Regulation, 1793—*Indian Income-tax Act,* 1922—*Income derived by zamindar from permanently-settled estates—Liability to assessment to income-tax.*

Held, on the true construction of the Bengal Regulations of 1793, and particularly of Regulation I of 1793 (The Bengal Permanent Settlement Regulation), that while the Regulations contain assurances against any claim to an increase of the *jama* based on an increase of the zamindari income, they contain no promise that a zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property taxation, or that the income of a zamindari shall not be subjected with other incomes to any future general taxation of incomes.

Held, accordingly, that notwithstanding the Permanent Settlement Regulation I of 1793, income derived by a zamindar from land in permanently-settled estates, other than "agricultural income", is liable to assessment to income-tax under the Indian Income-tax Act, 1922, sections 6 and 12.

Judgment of the majority of the Full Bench of the High Court, Calcutta, in *Emperor* v. *Probhat Chandra Barua,* (1927) I.L.R. 54 Cal. 863 (F.B.), affirmed.

Appeal No. 90 of 1928 from two judgments and orders of the High Court, Calcutta, dated the 14th March, 1927 and 11th May, 1927, respectively, which were passed on a reference under section 66 of the Income-tax Act, 1922, by the Commissioner of Income-tax, Assam.

The main question on the present appeal was whether income from land, which was permanently settled under the Bengal Regulations of 1793, was liable to be assessed to income-tax subject only to the exemptions specifically conferred by the Income-tax Act, 1922.

The material facts of the case, and the relevant provisions of the Income-tax Act and the Bengal Regulations, are fully set out in their Lordships' judgment and in the report of the case in the Court below, *Emperor* v. *Probhat Chandra Barua*[1].

E. B. Raikes, K.C. (with *G. D. McNair* and *L. C. Graham-Dixon*) for appellant.—The imposition of a tax on the income derived from these zamindari estates is contrary to the guaran-

*P.C. Appeal No. 90 of 1928. 26th May, 1930.
Bengal Appeal No. 26 of 1927.

1. (1927) I.L.R. 54 C. 863 (F.B.).

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tees and assurances given at the time of the Permanent Settlement and embodied in the Bengal Regulations. Referred to the judgments in *The Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*,[2] *Emperor* v. *Probhat Chandra Barua*,[3] *Emperor* v. *Indu Bhusan Sarkar*,[4] *Maharajadhiraj of Darbhanga* v. *Commissioner of Income-tax*[5] and *Emperor* v. *Probhat Chandra Barua*[1] (being the case now under appeal).

We submit that the learned Judges who were in the majority in the present case overlooked the distinction between a tax on income from land as such, and a tax on an individual landowner—in common with the rest of the community—on something else which might cause him to pay a further amount out of the income from his land.

According to the decision of Lord Lyndhurst in *Freeman* v. *Fairlie*[6], which the Board approved in *Gunga Gobind Mundul* v. *The Collector of the Twenty-four Pergunnas*[7] the ownership of the soil was not in the Crown. That being so, the *jama* could only be a tax and not a rent or a rent charge: Field's Bengal Regulations. To impose a further tax on the profits from the zamindari is virtually to increase the *jama*, which the Regulations distinctly declared, was "fixed for ever".

The Income-tax Act, 1922, does not either expressly or even impliedly repeal the guarantee contained in the Regulations. Unless and until the Government expressly repeals or repudiates the Permanent Settlement Regulations, they should be held binding on the Government. The Income-tax Act contains no provision repealing or altering the effect of the Permanent Settlement Regulations or charging any of the items in question: *Mayor, etc., of London* v. *Netherlands Steamboat Company*,[8] *Associated Newspapers, Ltd.* v. *City of London Corporation*[9] and *Pole-Carew* v. *Craddock*[10]. The judgment of Lord Sumner in *Attorney-General* v. *Exeter Corporation*[11] is distinguishable.

There is abundant authority for the proposition that a tax cannot be imposed without clear and express words for that purpose. "When the Legislature assume to impose a tax on

1. (1927) I.L.R. 54 C. 863 (F.B.).
2. (1922) I.L.R. 45 M. 518.
3. (1924) I.L.R. 51 C. 504.
4. (1926) I.L.R. 53 C. 524.
5. (1924) I.L.R. 3 Pat. 470.
6. (1828) 1 Moo. I.A. 305.
7. (1867) 11 Moo. I.A. 345 at 359.
8. (1906) A.C. 263.
9. (1916) 2 A.C. 429.
10. (1920) 3 K.B. 109.
11. (1911) L.J. 80 K.B. 636.

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the subject, they must do so in clear and distinct terms; if the matter remains in doubt, the subject is entitled to judgment", per Lord Esher, M.R., in *Commissioners of Inland Revenue* v. *Angus*[12]. There should be no further burden on income, where the Government demands had been commuted under a Permanent Settlement: *The Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[2].

Dunne, K.C., (with *Wallach*) for respondent.—We submit that the appellant's contention that the Government was not the owner of the soil and *therefore* the *jama* was a tax and not a rent or rent charge, is untenable. The Board's judgment in *Secretary of State for India* v. *Srinivasachariar*[13]. shows that the Ruling Power in India had some proprietary interest in the land. It was thus competent to impose a rent charge. In the Permanent Settlement Regulation the term "proprietor of the soil" meant only the person who was to pay the Government revenue. There was no grant of the estate to the zamindars, and the Permanent Settlement gave them no rights in the soil. The Government merely assigned to the zamindars their (the Government's) right to collect from the *ryot* the land revenue. The observations of Lord Lyndhurst in *Freeman* v. *Fairlie*[6]. that "I think it is to be collected from those Regulations (*i.e.*, the Permanent Settlement Regulation of 1793) that the proprietors of land in India had an absolute ownership and dominion of the soil" are pure *obiter dicta*, and are not well founded. The appellant contends that *Freeman* v. *Fairlie*[6] was approved by the Board in *Gunga Gobind Mundul* v. *The Collector of the Twenty-four Pergunnas*[7], but the decision in the latter case does not touch the point at all. *Freeman* v. *Fairlie*[6] was only cited there to show that individual ownership of lands could exist in private persons if there is a grant from the Government.

"Such a settlement (*i.e.*, for revenue) does not establish proprietary rights in the land, but is made with Government as to their claim to the *khiraj* or revenue": *Juggut Mohini Dossee* v. *Mussumat Sokheemoney Dossee*[14]. The words "proprietor of land" in the Regulation have a technical significance: per Sir Barnes Peacock in *The Collector of Trichinopoly* v. *Lekkamani*[15].

2. (1922) I.L.R. 45 M. 518.
6. (1828) 1 Moo. I.A. 305.
7. (1867) 11 Moo. I.A. 345.
12. (1889) 23 Q.B.D. 579 at 589.
13. (1920) L.R. 48 I.A. 56: I.L.R. 44 M. 421: 40 M.L.J. 262 (P.C.).
14. (1871) 14 Moo. I.A. 289 at 305.
15. (1874) L.R. 1 I.A. 282: 21 W.R. 358.

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[LORD RUSSELL.—The expression "proprietors of the land" in the Regulation is, according to your contention, not inconsistent with the theory that the Government was the proprietor of the soil.]

The zamindars were merely stewards or administrators of the Government's share in the land: *Raja Lelanund Sing Bahadoor* v. *The Government of Bengal*[15].

The Permanent Settlement was virtually a contract between the Government and the zamindars, a bargain evidenced by documents sanads and kabuliyats: *Secretary of State for India* v. *Raja Jyoti Prashad Singh*[16]. The effect of the settlement was that the zamindars obtained for the first time an entirely new estate, namely, a permanent, heritable and alienable tenure in the land, subject to the payment of a fixed assessment charged upon the estate.

On the question of implied repeal of the Regulation by the Income-tax Act, learned counsel referred to *Corporation of Blackpool* v. *Starr Estate Company, Ltd.*[17]

Nova Scotia's case[18] was also cited, and the judgment of Lord Blackburn in *Garnett* v. *Bradley*[19] distinguished.

Raikes, K.C., in reply, referred to the judgment of the Bombay High Court in *Vykunta Bapuji* v. *The Government of Bombay*[20] as supporting the view that the Sovereign in India never had any property in the soil.

26th May, 1930. Their Lordships' judgment was delivered by

Lord Russell.

LORD RUSSELL OF KILLOWEN.—The appellant is Zamindar of the Permanently Settled Estate of Gouripur, and he appeals to His Majesty in Council in the circumstances herein set forth.

By an assessment note of the Income-tax Officer, of Dhubri, dated the 28th August, 1925, the appellant was assessed under the Indian Income-tax Act, 1922, to income-tax in respect of income arising from his said estate. On appeal the assessment was confirmed by order of the Assistant Commissioner, dated the 22nd December, 1925.

At the request of the appellant the Commissioner of Income-tax, Assam, acting under section 66 of the said Act, submitted certain questions for the decision of the High Court.

15. (1855) 6 Moo. I.A. 101 at 108.
16. (1926) L.R. 53 I.A. 100: I.L.R. 53 C. 533 (P.C.).
17. (1922) 1 A.C. 27.
18. (1922) 2 A.C. 176.
19. (1878) 3 A.C. 944.
20. (1875) 12 Bom. H.C.R. App. p. 1.

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The questions so submitted were three in number, and (as amended in the course of the hearing) they were in the following terms:—

"I. Whether the following sources of income are agricultural and therefore exempted from assessment to income-tax under section 4 (3) (*viii*) of the Act? [Then follow 10 items which it is unnecessary to set out here.]

"II. Whether income derived from such of the above sources as were not taken into consideration at the time of fixing the Jama at the Permanent Settlement is assessable for income-tax purposes?

"III: Whether, having regard to the terms of the Permanent Settlement Regulation, income derived from land in permanently settled estates, subject to the exemptions provided by the Legislature, is liable to assessment to income-tax?"

In view of a diversity of judicial opinion already existing in regard to the proper answer returnable to the third question, both questions II and III were, by an order of the 21st May, 1926, referred for decision of the Full Bench, the consideration of question I being in the meantime deferred.

The case was argued before the Full Bench consisting of five Judges of the High Court, with the result that Ghose, Buckland and Panton, JJ., took one view and Mukerji and Suhrawardy, JJ., took a different and opposite view.

The majority of the Judges held that questions II and III should both be answered in the affirmative. In the opinion of the minority, question III should be answered in the negative, from which answer it would follow that question II would not arise.

By order, dated the 14th March, 1927, the reference to the Full Bench was disposed of in accordance with the opinion of the majority of the Court.

The remaining question I was decided by the High Court on the 11th May, 1927. The appellant confined his claim for exemption to three items out of the specified ten items, but the High Court held that none of the three items were exempted as agricultural income, and accordingly question I was answered in the negative.

By an order of the High Court, dated the 7th November, 1927, the application of the appellant for leave to appeal to His Majesty in Council against the said judgments or orders of the 21st May, 1926, the 14th March, 1927, and the 11th May, 1927, was granted.

It is in these circumstances that the matter came before this Board.

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There can be no doubt as to the importance or difficulty of this case, which, in their Lordships' opinion, depends primarily, if not entirely, upon the consideration of question III. It is sufficient to state that the problem of the correct answer to question III has been now considered before different High Courts in Madras, Patna and Calcutta by thirteen Judges. As their Lordships read the various decisions, it would appear that five of the thirteen Judges would answer question III in the affirmative and eight would answer it in the negative.

The argument for the appellant on question III was presented to their Lordships in great, but not excessive, detail, and covered a wide ground. It may be summarised thus:—

That at the time of the Permanent Settlement in 1793 definite guarantees and assurances were given by the governing authority, and were embodied in the Bengal Regulations of 1793 (hereinafter alluded to as the Regulations) to the effect that the income of the Zamindar from his estate would not, beyond payment thereout of the *jama*, be further touched or taxed; that the imposition of a tax on the income of a Zamindar derived from his zamindari would be a breach of those guarantees and assurances; that the Indian Income-tax Act, 1922, does not, according to its true construction, purport to impose a tax on the income of a Zamindar derived from his zamindari; and that, if such a tax could be said to be imposed under or by virtue of the language used in the Act, nevertheless the language used was not so clear and explicit as to operate as a repeal of the legislative provisions of the Regulations.

Such in outline was the appellant's contention.

Incidentally to this argument the Board was invited to consider, and indeed pronounce upon, the question, mainly historical, of the position of the governing authority immediately before the Permanent Settlement in regard to ownership of the land or of some proprietary interest therein. The attention of their Lordships was called to the various views expressed in such works and documents as Field's "Regulations of the Bengal Code," Phillips's "Land Tenures of Lower Bengal" and Shore's Minutes. Their Lordships were also referred to certain reported decisions of the Courts.

Their Lordships, however, are of opinion that there is here no occasion for any pronouncement by them upon the question of the exact nature of the rights and interests in relation to the land which existed in the governing authority before 1793, but that this appeal falls to be determined upon a consideration of

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the language of the Regulations and of the Indian Income-tax Act, 1922.

In view of the argument that the Act does not according to its terms purport to impose a tax on the income of a Zamindar derived from his zamindari, their Lordships propose in the first instance to examine the language of the Act, and then, if the Act does according to its terms, actually impose such a tax, to consider if the imposition of the tax is to any, and what extent, inconsistent with the provisions of the Regulations.

The Act of 1922 is a consolidation and amendment Act. Section 1 refers to its title, sphere of operation and commencement. Section 2 is a definition section. The rest of the Act is divided into ten chapters, of which only Chapters I and III seem relevant to the present purpose.

Chapter I is entitled "Charge of Income-tax," and consists of sections 3 and 4. Section 3 is so framed as to charge income-tax at the rate which may from time to time be enacted. The income-tax is stated to be "in respect of all income, profits and gains of the previous year of every individual." Section 4 (1) provides that the Act is to apply to all income, profits or gains as described or comprised in section 6 from whatever source derived, accruing or arising or received in British India or deemed under the provisions of the Act to accrue or arise or to be received in British India. Section 4 (2) affords an instance of profits and gains accruing or arising without British India being deemed to accrue or arise in British India. Section 4 (3) enumerates a list of classes of income to which the Act shall not apply. Income derived from a zamindari is not included in the list, but "agricultural income" is included.

It would appear that the purpose of section 3 is to charge income-tax at the current rate for the time being, and that the purpose of section 4 is (by sub-section 1) to confine the tax to income actually or artificially accruing or arising or received in British India, and (by sub-section 3) to exempt specified classes of income from tax.

Although Chapter I is entitled "Charge of Income-tax," the real charging section would appear to be section 6, which occurs in Chapter III.

Chapter III is entitled "Taxable Income," and is composed of sections 6 to 17 inclusive. Section 6 provides that "save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income-tax, in the manner hereinafter appearing, namely:—

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(i) Salaries.

(ii) Interest on securities.

(iii) Property.

(iv) Business.

(v) Professional earnings.

(vi) Other sources."

Each of the next following six sections deals severally with each of the six heads of income, profits and gains specified in section 6, and states with greater particularity the items in respect of which the tax shall be payable by the assessee under the particular "head," and gives details of allowances and exemptions in regard to the different heads. Section 9 accordingly deals with the head "Property," and a perusal of it makes it clear that the "income, profits and gains" charged under the head "Property," are confined to the annual value of "buildings or lands appurtenant thereto," in other words, to the annual value of what may be conveniently called house property. The income of a Zamindar derived from his zamindari would not be chargeable under that head. If chargeable in the result it would be under the head "Other sources."

Section 12 deals with that head, and requires close attention. Section 12 (1) provides that the tax shall be payable by an assessee under that head—

> "In respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads)."

These words appear to their Lordships clear and emphatic, and expressly framed so as to make the sixth head mentioned in section 6 describe a true residuary group embracing within it all sources of income, profits and gains provided the Act applies to them, *i.e.,* provided that they accrue or arise or are received in British India or are deemed to accrue or arise or to be received in British India, as provided by section 4 (1), and are not exempted by virtue of section 4 (3).

It was contended on behalf of the appellant that the income derived from a zamindari was never brought into charge at all, because, in section 6, the words "other sources" must mean sources other than those described above, and therefore could not include any source which could properly be described as "property."

Incidentally it may be pointed out that this argument, if successful, could not be confined to the income derived from a zamindari; it would free from liability to income-tax all income

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derived from land which did not consist of buildings or lands appurtenant thereto, and it would seem to render unnecessary the specific exemption of agricultural income.

Their Lordships, however, feel unable to accede to the argument. In section 6 the words "other sources" used in relation to the word "property" would naturally mean sources other than the source which the word "property" connotes in this Act. But if there were any doubt on this score, it would disappear in the light of section 12, the meaning and effect of which have been indicated above.

Upon this part of the case therefore their Lordships are of opinion that the Indian Income-tax Act, 1922, by sections 6 and 12, brings into charge for the purposes of income-tax the income derived from a zamindari, and that a Zamindar is assessable in respect of income, profits and gains derived from that source.

Before leaving this part of the case their Lordships deem it right, in view of discussions in the course of the arguments before the Board, to make a further statement as to the liability of the appellant to pay income-tax upon the income derived from his zamindari.

The tax is upon "income, profits and gains." It is not a tax on gross receipts. With this fact in view, each section which deals with one of the first five "heads" specified in section 6 contains, where proper, specific provisions for the necessary deductions and allowances to be made for the purpose of arriving at the taxable balance. Section 12, which deals with the general residuary group, is necessarily framed in general terms and authorises the allowance of any "expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains."

Their Lordships were unable to ascertain upon what footing the appellant had been assessed in respect of the income derived from his zamindari, *i.e.*, whether on the gross income or after some allowance had been made in respect of the *jama* assessed and paid upon the lands. Their Lordships are of opinion that, in assessing the appellant to income-tax in respect of the income derived from his zamindari, his income, profits and gains from that source should be computed after making proper allowance in respect of the *jama* assessed and paid.

Their Lordships now proceed to consider the question whether the imposition of income-tax in respect of the income

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derived from the zamindari is to any and what extent inconsistent with the provisions of the Regulations.

In regard to this part of the case their Lordships desire to make this observation. The Bengal Regulations of 1793 are lengthy and numerous. In the course of the arguments before the Board attempts were made to support the respective arguments by a phrase picked from one Regulation or a passage chosen from another, even though the particular Regulation only purported to deal with some matter incidental to the Permanent Settlement. In the opinion of their Lordships this part of the case falls to be determined primarily upon a consideration of the language of Regulation I of 1793. While bearing in mind the passages in other Regulations to which their attention was drawn, their Lordships feel that the above-mentioned Regulation is the master Regulation for the immediate purpose before the Board, and that its provisions constitute the overriding feature in the present case.

It bears date the 1st May, 1793, but is retrospective and operates as from the 22nd March, 1793. This last-mentioned date was the date of a Proclamation, to certain Articles of which the Regulation gave legislative effect.

In so far as it relates to the case of the appellant, the Regulation may be conveniently summarised.

Articles I and II of the Proclamation (paras. 2 and 3 of the Regulation) contain a notification by the Governor-General in Council to all Zamindars in the province of Bengal that he has been empowered by the Court of Directors for the affairs of the East India Company to declare the *jama* which has been or may be assessed upon their lands under the Regulation for the decennial settlement of the public revenues of Bengal passed on the 18th September, 1789, fixed for ever.

Article III of the Proclamation (para. 4 of the Regulation) contains a declaration to the Zamindars with whom a settlement had been concluded under the Regulation of the 18th September, 1789, that at the expiration of the term of the settlement no alteration will be made in the assessment which they have engaged to pay, but that they and their heirs and successors will be allowed to hold their estates at such assessment for ever.

Article VI of the Proclamation (para. 7 of the Regulation) is of great importance and appears to their Lordships to embody the legislative statements and provisions which are most favourable to the arguments advanced on behalf of the appel-

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lant. The first sentence recites as facts well known in Bengal (1) that the public assessment upon the land has never been fixed; (2) that the rulers have from time to time demanded an increase of assessment from the proprietors of land; (3) that for the purpose of obtaining this increase not only have frequent investigations been made to ascertain the actual produce of the estate, but it has been the practice to deprive the proprietors of the management of their lands. The second sentence of Article VI recites that the Court of Directors considers these usages and measures detrimental to the prosperity of the country, and states that the Zamindars with whom a settlement has been or may be concluded, are to consider the orders fixing the amount of the assessment as irrevocable and not liable to alteration. The third sentence runs as follows:—

"The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs or successors, by the present or any future Government, for an augmentation of the public assessment, in consequence of the improvement of their respective estates."

It is upon this third sentence of Article VI that the appellant mainly relies for his contention that the imposition of income-tax in respect of the income derived by him from his zamindari would be a breach of and inconsistent with the provisions of the Regulations. He alleges that the *jama* was a tax and not a rent or rent-charge, and that by the Regulations a legislative assurance or guarantee was given that no tax beyond the amount of the fixed *jama* would be imposed upon the income of the permanently settled estate.

To this contention the respondent makes answer:—(1) that what the Permanent Settlement accomplished was to fix for ever the quantum of the Government's share of the produce of the land; and (2) that upon their true construction the Regulations do not purport to exempt the Zamindar from taxation in respect of the income derived from his zamindari.

Their Lordships, after careful consideration of the Regulations, have arrived at the conclusion that the argument of the appellant cannot succeed.

They are unable to find in the Regulations any statement or assurance that a Zamindar will never be liable to taxation in respect of the income derived from his zamindari, or (to put the matter from another point of view) that a Zamindar will, as to so much of his property as consists of income derived from

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his zamindari, be exempt from schemes of taxation applicable generally to the incomes of the inhabitants of British India.

The language used in Regulation I, Article VI, does not, in their Lordships' opinion, mean anything other than this:—"You have in the past been liable to have the amount of the *jama* increased according as the actual produce of the estate increased; to enable the Government to obtain this you have been subjected to frequent investigations to ascertain the actual produce and you have even been deprived of the management of your estates. All this shall cease. You shall have fixity of payment and fixity of tenure. If you improve the revenue of your zamindari you shall enjoy the fruits of your improvements without fear of the Government claiming that because the revenue produced by the estate has increased the payment you make to Government as a condition of holding that estate shall be increased also."

Their Lordships have ventured to paraphrase Article VI, but they think that their paraphrase expresses with sufficient accuracy the true intent and meaning of the Article. In their Lordships' opinion, while the Regulations contain assurances against any claim to an increase of the *jama,* based on an increase of the zamindari income, they contain no promise that a Zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property taxation, or that the income of a zamindari shall not be subjected with other incomes to any future general taxation of incomes.

Their Lordships agree with the views expressed by Ghose, J., in the following passage from his judgment:—

"There was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a general tax upon incomes of all persons irrespective of the fact whether they are Zamindars with whom the Permanent Settlement was concluded or not."

It follows that in their Lordships' opinion Question II and Question III should both be answered in the affirmative.

Question I was but faintly argued before the Board. As to it their Lordships need only say that they have not been furnished either with materials or reasons which would justify them in suggesting that any of the 10 specified items could properly be described as agricultural income within the definition of agricultural income contained in section 2 (1) of the Indian Income-tax Act, 1922. Their Lordships accordingly agree with the negative answer which has been given to Question I.

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For the reasons given their Lordships are of opinion that this appeal fails and should be dismissed, and they will humbly advise His Majesty accordingly. There will be no order as to the costs of this appeal.

Solicitors for appellant: *W. W. Box & Co.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

[In the matter of the Indian Companies Act VII of 1913 and in the matter of the Sabapathi Press, Co., Ltd.]

Sabapathi Rao and others .. *Petitioners**

v.

Sabapathi Press Co., Ltd. .. *Respondents.*

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Indian Companies Act (VII of 1913), Ss. 168, 227 and 229—Winding-up by Court—Debts due from the Company—Interest on, when payable—Contracts by Company subsequent to winding-up—Validity.

When a Company has been ordered to be wound-up, the interest upon debts payable by the Company ceases to run from the date of the winding-up order, unless the Company is solvent. The Company's solvency is established if, after payment of the principal and interest up to the date of winding-up there are some assets sufficient to meet the liability on account of interest accruing after the commencement of the liquidation.

Palmer's Company Law, 12th Edn., p. 439; In re *Humber Ironworks and Shipbuilding Co.*, (1869) L.R. 4 Ch. App. 643; In re *Duncan & Co.*, (1905) L.R. 1 Ch.D. 307; *Ghansham Das* v. *Public Banking and Insurance Co.*, (1919) I.L.R. 1 Lah. 154 and *Devi Ditta Mal* v. *Official Liquidator, Amritsar Bank, Ltd.*, (1920) I.L.R. 1 Lah. 368, referred to.

Once the winding-up order is made the Company becomes as from the date of the petition incapable of entering into contracts without the sanction of the Court. *Gosling* v. *Gaskell*, (1897) A.C. 575 (H.L.), followed.

S. 227 (2) of the Companies Act does not apply to a contract by the Company for the purchase of goods.

B. Somayya for N. Venkataswami Setty, Pola Sankariah and Hanumanthappa.

T. R. Arunachala Aiyar for Official Liquidator.

T. M. Venugopala Mudaliar for applicant.

T. Krishnaswami Aiyangar for creditor.

The Court delivered the following

JUDGMENT.—I have to deal with this claim in the winding-up proceedings. A creditor, Pola Sankariah by name, applied

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*O.P. No. 94 of 1922. 25th August, 1930.
3rd September, 1930.

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to the liquidator for payment of his debt. He failed to comply with the request and I have now to decide whether the creditor's claim is well founded.

To make the point at issue clear, I must briefly set forth the course taken by these liquidation proceedings. The petition to wind up this Company (The Sabapathi Press Co., Ltd.) was filed on the 8th of May, 1922. Mr. Justice Kumaraswami Sastri dismissed the petition on 30th November, 1922, holding that no valid grounds existed for making an order of compulsory winding up. Against this order an appeal was filed and, on 5th November, 1924, the Appellate Court set it aside and remanded the petition to the Original Side for fresh disposal. The matter then came up before Mr. Justice Beasley and on the 9th of April, 1927, he made an order referring two questions to the Official Referee. With one of those questions we are directly concerned. That related to the debt now claimed as due by the creditor. It was then pleaded that that debt was discharged either by payment or adjustment on 31st of December, 1921. The Official Referee submitted his report, finding *inter alia* that the debt due to the applicant was not discharged as alleged. Mr. Justice Beasley (as he then was) accepted the Official Referee's findings, found that the Company's affairs were in a very unsatisfactory state and made an order, dated 16th November, 1927, directing the Company to be compulsorily wound up. Mr. Venkata Rao, by dubious methods (this is the effect of the judgment of Mr. Justice Beasley) acquired a dominant position in the Company and by adopting an aggressive and high-handed attitude, used that position to gain dishonest advantage for himself, his relations and friends. A firm known as "K.V.S.R." which, as the learned Judge observed, was Venkata Rao's own firm, was appointed treasurers of the Company and some of the Company's factories were leased to this firm on terms highly detrimental to the Company. This K.V.S.R. firm in their turn sub-leased the factories making a large profit, to a joint family concern of which the present applicant Pola Sankariah was a member. There were two factories, one at Tadpatri and the other at Adoni. The sub-lessees effected certain repairs to these factories and a large sum became payable to them on this head by the Company. The debt became due before December, 1921. It amounted to about Rs. 25,000. This fact is not disputed. Before proceeding further, I may mention that the winding-up order made by Mr. Justice Beasley was confirmed on the 18th of April, 1929.

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The question to be decided is, whether the debt due to the creditor was discharged by payment on the 31st of December, 1921. Mr. Venkata Rao, I have said, raised this incidental question and it was decided in favour of the creditor. As the liquidator raises the point again, I shall deal with it fully.

The account books of the Company containing entries of the 31st December, 1921, have been produced. There are some entries to be found which were made apparently after the accounts were closed and the balance was struck on that date. It is among such entries that those relating to the alleged payments find a place. The applicant alleges that these entries were fraudulently interpolated. Mr. Venkata Rao, the Chairman of the Board of Directors, annexes to his affidavit, dated 13th June, 1922, as Ex. B, what he calls an "unaudited balance sheet". It purports to disclose the state of affairs of the Company as at the end of December, 1921. The amounts due to the applicants are shown in that balance sheet under the heading "Liabilities". There are two amounts shown as due in respect of the two concerns, and the total is given as Rs. 25,546-2-1. This then is an admission by Venkata Rao as representing his Company. According to it, the debt due to the applicants was not discharged by payment on 13th June, 1922. From this the inference must follow that the entries showing payment in the books of the Company are spurious and fraudulent. It will be seen from what I have said that their very position, and the manner in which they were made, render them extremely suspicious. Added to this, there is the further fact that Mr. Venkata Rao admitted on 13th June, 1922, that the debt was subsisting. It is, therefore, fairly clear that these entries of payment were made not on the 31st December, 1921, the date they bear, but some time subsequent to 13th June, 1922. There was an "audited balance sheet" prepared in September, 1922, as distinguished from the "unaudited balance sheet" to which I have referred. In this balance sheet the debt due to the creditor is shown as having been discharged. I understand that among the numerous charges made in this winding-up petition, there is a complaint against the accuracy of this balance sheet. With that I am not at present concerned, but the fact that emerges is, that the impeached entries must have been made after 13th June, 1922, the date of Venkata Rao's affidavit, and before 27th September, 1922, the date of the "audited balance sheet". It is also noticeable that in the unaudited balance sheet, the amount shown as cash in the hands of the treasurers is Rs. 33,000 odd, whereas in the audited balance sheet it dwindles down to a little

over Rs. 12,000. This is of course consistent with the theory of payments having been made between these two dates. Such payments must necessarily diminish the cash in the hands of the Company's treasurers. So much for the payment alleged on the 31st December, 1921.

The liquidator asks me to deal with another suggestion, namely, that the payments were made on the 31st December of the following year. It is not the account books of the Company that are relied on for this purpose, but the liquidator says that he is perplexed by the entries in the account books of K.V.S.R. & Co., the Company's treasurers. In their books, certain adjustment entries were made on the 31st December, 1922. The applicants are credited with the amounts which the Company owed them, those sums being debited against the Company. In other words, the applicants' position is changed, K.V.S.R. & Co. being substituted as their debtors in the place of the Company itself. The entries refer to, and purport to derive their authority from, the Company's audited balance sheet of September, 1921. How can these entries in the account books of K.V.S.R. & Co. bind the applicants? Before they can be bound, it must be shown that there was an arrangement amounting to a novatio to which they were also parties.

These later entries show that it is not even pretended that actual payments were made to the applicants. K.V.S.R. & Co., instead of holding the monies due to the applicants as the Company's treasurers, continue to hold them in their individual capacity. This, in short, is the effect of these dubious entries. This is the kind of evidence that the liquidator places before me in support of his suggestion that the debt has been discharged. I therefore find that neither on the 31st of December, 1921, nor on the 31st of December, 1922, was the debt due to the creditor discharged by payment or adjustment.

Then there is another question that the liquidator raises. I have already said that the petition for winding up was originally dismissed in 1922. Till the winding-up order was made in 1927 Mr. Venkata Rao continued to act as the Chairman of the Board of Directors. On the 10th of December, 1926, in that capacity, he entered into a settlement of accounts with the creditor in question. It was found that the debt was reduced to Rs. 19,987-3-9. The creditor wants to abide by this settlement, and the question is, is it binding upon the liquidator? The capital of the Company is represented by 500 shares. Mr.

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Somayya appears for persons owning 342 shares and Mr. Venugopala Mudaliar for a gentleman holding 9 shares. On behalf of these shareholders I am asked to treat the settlement as binding. Then there are three creditors of this Company, two represented by Mr. Somayya and one by Mr. T. Krishnaswami Aiyangar. On behalf of these creditors also it is stated that the settlement should be treated as binding. In the view that the settlement is beneficial to the Company the liquidator now concurs. My decision, therefore, is that the settlement, dated the 10th of December, 1926, must be taken as binding.

In regard to this debt there is a further question raised. In the case of a winding up by the Court, the winding up dates from the presentation of the petition. (Section 168 of the Indian Companies Act.) In this case, nearly six years elapsed between the presentation of the petition and the winding-up order. I have already said that the petition was presented on the 8th of May, 1922, and the winding-up order was made on the 9th of April, 1927. The question I am asked to decide is, whether interest is to be computed or not subsequent to the winding up. It is not disputed that the debt carries interest. The law on this point is stated thus in Palmer's *Company Law*, 12th Edn., p. 439:

"When a Company has been ordered to be wound up, the interest upon debts which carry interest ceases to run from the date of the winding-up order, unless the assets are enough to pay all debts in full."

The point was first fully considered in In re *Humber Ironworks and Shipbuilding Co.*[1] The position of the creditors Selwyn, L.J., observes, must be considered under two aspects —first when there is, and next when there is not, a surplus. Where the estate is insolvent, nothing should be allowed for interest, but the opposite rule applies where the estate is solvent, that is, where there is a surplus. In the latter case, in whatever manner the dividends may originally have been made, if it turns out that there is an ultimate surplus, the account must be taken as between the Company and the creditors in the ordinary way; that is, by applying each dividend in the first place to the payment of the interest due at the date of such dividend and the surplus, if any, to the reduction of the principal. The rule that interest is payable notwithstanding the winding up, when there are surplus assets, is also laid down in In re *Duncan & Co.*[2] This is now treated as settled law. This question was considered in a Lahore case and this principle was applied. Shadi

1. (1869) L.R. 4 Ch. A. 643. 2. (1905) L.R. 1 Ch. D. 307.

Lal, J., after stating the rule in the terms I have just mentioned, proceeds to lay down the test of solvency. The Company's solvency is established if, after payment of the principal and interest up to the date of winding up, there are some assets sufficient to meet the liability on account of interest accruing after the commencement of the liquidation. (*Ganshami Das* v. *The Public Banking and Insurance Co.*[3]) The same view was taken in another Lahore case, *Devi Ditta Mal* v. *The Official Liquidator, Amritsar Bank, Ltd.*[4] In the present case, it is admitted that even after all the creditors are paid in full there will be a substantial balance available for meeting the claims of the contributories. I, therefore, hold that interest has not ceased to run from the date of the winding-up order.

These, I understand, are the only three points in regard to which the liquidator wants my direction in respect of this debt. In the light of my judgment, the parties are directed to bring in a statement showing the amount due to the applicant.

The matter will stand adjourned a week for this purpose.

The applicants' costs, which I fix at Rs. 400, must be paid out of the assets. I do not propose to allow the liquidator his costs, but, as he does not press for them, I need not give my reasons.

I shall now deal with the question of unpaid dividends. During the pendency of the petition for winding up, dividends were declared for 1921-25 (both years inclusive). Mr. Venkata Rao, as a part of the general policy he has been pursuing, preferred such of the shareholders as were his friends and relations and paid them the dividends due and made default in regard to the rest. Some of the shareholders belonging to the latter class now apply that the liquidator should be directed to pay them also the dividends declared. To place all the shareholders on a footing of equality, I must comply with this application. The liquidator, after satisfying himself that the dividends claimed are due, shall make the payments. If he feels any doubt, the matter may be brought up before the Court.

Next as regards Hanumanthappa's claim: the liquidator will examine this and state in one week what his view is.

I shall now proceed to deal with the claim of Messrs. R. D. Lakshmi Das & Co., represented by Mr. T. Krishnaswami Aiyangar, their counsel. They claim Rs. 3,381-13-6 in respect of goods supplied to the Company between the commencement

3. (1919) I.L.R. 1 Lah. 154. 4. (1920) I.L.R. 1 Lah. 368.

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of the winding up, that is, the presentation of the petition and the winding-up order. The effect of a winding-up order under section 227 (2) is to avoid all dispositions of the property of the Company made between these two dates, unless the Court otherwise orders; that is to say, the winding-up order has a retrospective effect. What are avoided under the section are *dispositions* by the Company of its property. But even *payments* by the Company after the commencement of the winding up are avoided unless sanctioned by the Court.

Lindley on Companies, 6th Ed., Vol. 11, page 899.

Where payments are honestly made and in the ordinary course of business, it is usual for the Court to allow them.

Palmer's Company Law, 12th Ed., page 220.

In regard to dispositions pending petition, the practice of the Court is to allow them if made honestly and in the ordinary course of business.

Palmer, page 426; Lindley, Vol. II, page 900.

But what we are here concerned with is neither a disposition of property nor a payment. The Company contracted to purchase goods and actually took delivery of them. Section 227 (2) does not in terms apply to such a transaction, but in *Gosling* v. *Gaskell*[5] Lord Herschell seems to assume that once the winding-up order is made, the Company becomes as from the date of the petition incapable of entering into *contracts* without the sanction of the Court (page 591). In the present case, it is conceded that the goods were purchased by the Company in the ordinary course of trade. I, therefore, confirm the transactions.

As regards the amount, it is admitted that Rs. 50 must go out from the amount claimed. Out of a balance of Rs. 3,331-13-6 I authorise payment of that sum less Rs. 500 with interest at 9 per cent. per annum from the 1st of January, 1927. As regards the sum of Rs. 500 shown against the 15th of December, 1926, it is described as a hand loan paid to Mr. Venkata Rao, who purported to receive it as the Chairman of the Board of Directors. Whether the liquidator is bound to pay this sum or not, I do not wish to decide at present. Granting that the liquidator is not bound to pay this sum from the assets of the Company, it may be open to the creditor to ask

5. (1897) A.C. 575 (H.L.).

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that it should be paid over to him from any amount to be found payable by the Company to Mr. Venkata Rao. This point I must reserve for future consideration. The applicant's costs which I fix at Rs. 150 shall come from the assets. The liquidator may pay himself Rs. 50 for his costs. I also direct that Mr. Gopalaswami Mudaliar be paid from the assets the costs of his application, which I fix at Rs. 50.

In pursuance of my judgment, dated 25th August, 1930, a statement has now been brought in, showing that the amount due up to 31st August, 1930, to Pola Sankariah is Rs. 20,369-4-10 including the costs awarded. By consent, this figure is accepted. The principal amount of Rs. 16,781-0-2 shall carry further interest at 6 per cent. per annum till date of payment.

The amount due to Hanumanthappa is by consent declared to be Rs. 2,756-8-6. This amount shall carry interest at 9 per cent. per annum from 28th December, 1926, to the date of payment. The liquidator shall pay Hanumanthappa's costs, which I fix at Rs. 150, from the assets. The liquidator's costs I fix at Rs. 50. This sum he may retain out of the assets.

S.R. *Claims allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Original Testamentary Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

G. R. Naidu and others .. *Petitioners**

v.

Kota Savitramma and others .. *Respondents.*

G. R. Naidu v. Savitramma.

Receiver—Remuneration fixed on basis of collections—Conversion of old Government of India Bonds into new loan—Right of Receiver to commission—Power of Court to give further direction.

The Court appointed joint Receivers to an estate pending the disposal of a suit and fixed their remuneration on the basis of collections made. The estate was possessed of Government of India 1930 Bonds of a certain value which were kept in deposit in the Imperial Bank of India as security for an overdraft. When the Bonds were about to mature, the Master directed the Receivers to convert the same into the new 1933-36 Bonds issued by the Government of India. Thereupon certain of the parties to the suit apprehending that the Receivers would, for the purpose of earning commission, receive money for the old Bonds and re-invest it in the new loan, applied to the Master to authorise the Bank directly to make the conversion. The Master having ordered accordingly,

Held, in appeal, that the Receivers were not entitled to insist on collection and reinvestment of the amount, and that they could not claim commission in respect of the conversion as ordered.

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*T.O.S. No. 1 of 1929. 5th August, 1930.

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Haigh v. *Grattan,* (1839) 1 Beav. 201: 48 E.R. 916, relied on.

Held further, that even granting the matter admitted of any doubt on the construction of the order appointing the Receivers, the Court had the power to direct that, under the circumstances of the case, the Receivers were not entitled to commission in respect of the transaction.

G. Lakshmanna and *P. Satyanarayana* for petitioners 1 to 3.

A. Suryanarayana and *W. S. Krishnaswami Naidu* for 4th petitioner.

P. Venkataramana Rao and *D. Venkatasubbayya* for respondents.

V. Radhakrishnaiya for Receivers.

The Court delivered the following

JUDGMENT.—I do not think I can accede to Mr. Radhakrishnaiya's contention. The short point is, can the Receivers claim commission on the 1930 Bonds which have been directed by the Master to be converted into 6 per cent. 1933-36 Bonds under the Government of India Loan just announced? The estate is possessed of 1930 Bonds of the face value of Rs. 1,10,000. They have never been handled by the Receivers and are in deposit with the Imperial Bank of India, Madras, as security against an overdraft. These Bonds would, in the ordinary course, mature on the 14th of August, 1930, and it has been notified that the subscriptions for the new loan might not only be in cash but also *inter alia* in 6 per cent. Bonds 1930. The request for conversion should, I understand, be made before the 6th of August. Certain of the parties to the suit apprehending that the Receivers would, for the purpose of earning commission, receive money for the old Bonds and re-invest it in the new loan, applied to the Master to authorise the Bank directly to make the conversion instead of paying cash to the estate. The Master has made an order accordingly.

Two of the three joint Receivers question the correctness of the Master's order, urging that their right to receive commission on the sum of Rs. 1,10,000 should not be affected by the transaction. Mr. Radhakrishnaiya's argument may be put thus. It must be assumed that cash is received for the old Bonds and that the same amount is re-invested in the new loan. The act thus involves, he contends, first a collection and then an investment. Under the order of appointment, the Receivers are entitled to remuneration on collections and it follows (so he contends) that they can claim commission on the amount in question. I cannot accept this contention which involves a double fiction, to import which there is absolutely no warrant.

To adopt the Receivers' argument would be to strain language and no Court would countenance it merely for benefiting the Receivers at the expense of the estate. Then it is stated that the original order directs that all monies shall be collected by Mr. A. K. Ramachandran, one of the joint Receivers. Does this confer on him a right to insist on receiving cash for the Bonds merely to entitle the Receivers to commission? I feel no doubt that the answer must be clearly in the negative. But if authority be needed, there is a direct decision on the point. In *Haigh* v. *Grattan*[1], although a party offered to bring in the money, the Receiver claimed that he should be allowed to collect the amount and then pay it into Court; and it was urged for him that to prevent him from doing so would be to deprive him of the poundage. Langdale, M.R., overruled the contention, observing that the Receiver had no vested interest entitling him to collect the amount. The facts are parallel and I declare that the Receivers are not entitled to the commission claimed.

I should further observe that even granting that as a question of construction the matter admits of any doubt, it is open to the Court to give such directions as the justice of the case may require. It is strongly urged that having regard to the fact that the Receivers have already taken by way of commission about Rs. 25,000 it would be inequitable to burden the estate with a further sum of Rs. 5,500 (this is the amount now claimed) when the transaction involves no work and no labour on their part. I have no hesitation even on this ground in holding that they are not entitled to this commission.

There has been some discussion as to in whose names the new Bonds are to be taken. Mr. Venkataramana Rao suggests that they should be taken in the name of the Registrar, in order to avoid any claim being preferred by the Receivers to commission, when the Bonds have to be re-assigned to the party to be declared in the suit as entitled to the Bonds. As I am prepared to give a ruling at once that the Receivers have no such right, I direct that the Bonds may be taken in the name of Mr. A. K. Ramachandran, Joint Receiver, as this appears to me the course most in conformity with the previous orders made in this case.

It is unnecessary in the view I have taken, to decide the effect of the provision in the order, dated the 20th of Decem-

1. (1839) 1 Beav. 201: 48 E.R. 916.

G. R. Naidu v. Savitramma.

ber, 1928, which refers to commission on Government Promissory Notes and War Bonds.

This appeal against the Master's order fails and is dismissed but without costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Kolapalli Narasimhamurti and others .. *Petitioners**
(*Appellants-Accused*).

Narasimhamurti, *In re.*

Criminal Procedure Code (V of 1898), S. 421—Reasonable opportunity.

There is no absolute rule of law that before the Court dismisses the appeal under S. 421, there should be a special posting of the appeal some time after the presentation of the papers or that the Court should call for the records of the case, though, as a rule of caution and sound procedure, it may be advisable to do so. The only question under the section is if the appellant or his pleader had a reasonable opportunity of being heard in support of the appeal.

Turka Hussain Saheb, In re, (1924) I.L.R. 48 M. 385: 47 M.L.J. 661, referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Rajahmundry in Criminal Appeal No. 73 of 1929 preferred against the judgment of the Court of the 2nd Class Magistrate of Amalapuram in C.C. No. 270 of 1929.

M. Appa Rao for petitioners.

A. Narasimha Aiyar for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioners, five in number, were convicted by the 2nd Class Magistrate of Amalapuram under section 323, Indian Penal Code, and sentenced to a fine of Rs. 20 each or one month's rigorous imprisonment in default. Out of the fine, P.W. 1 was awarded Rs. 30 as compensation. They appealed to the Joint Magistrate of Rajahmundry. The petition of appeal and a copy of the judgment of the Sub-Magistrate were presented to the Joint Magistrate on the 5th August, 1929, when he was on tour, by a pleader on behalf of the petitioners. The Magistrate having heard, as he reports, the pleader in support of the appeal, dismissed it under section 421, Criminal Procedure Code. His judgment is brief. After stating that the judgment of the Sub-Magistrate sets out the evidence fully, it

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*Cr. Rev. Case No. 864 of 1929.
Cr. Rev. P. No. 775 of 1929. 14th March, 1930.

goes on to say that the attack on the complainant took place in daylight in the open and that the defence of *alibi* was a tissue of falsehood, and winds up with the remark that the appellant's pleader has shown no grounds for interference. For the petitioners it was represented at the time this petition came on for admission that according to the petitioner's pleader who presented the appeal, the Joint Magistrate personally perused the judgment and the grounds of appeal, and asked him whether he conducted the case in the Lower Court, to which he said that he did not conduct it throughout, that then the Magistrate asked him if he had anything to say in support of the appeal, that the pleader then asked for time to argue the case as he had not fully gone through the record, that no time was granted and the appeal was summarily dismissed under section 421. This representation for the petitioners was communicated to the Joint Magistrate, who has sent a report, dated 6th December, 1929, that the appeal was presented to him at the Amalapur Travellers' Bungalow in the morning, that on perusing the judgment of the Lower Court he informed the pleader who presented it that it appeared to fall into the class of appeals which he usually dealt with under section 421, Criminal Procedure Code, that the pleader voluntarily launched into the merits of the appeal rather fully, and was heard for at least half an hour, that no application for further opportunity to argue the case was made to him, that if such application had been made it would have been given, and that finally the Magistrate intimated his intention of dismissing the appeal summarily.

The question before me is whether the procedure adopted by the Joint Magistrate was in the circumstances substantially in accordance with the provisions of section 421, in other words, whether the petitioners or their pleader had a reasonable opportunity of being heard in support of the appeal.

On this point a decision of Mr. Justice Ramesam has been brought to my notice, namely, *Turka Hussain Saheb* In re[1]. That decision seems to lay down as a rule of law that a criminal appeal should not be heard at the time of presenting the papers even for the purpose of dismissal under section 421 of the Code of Criminal Procedure and that there must be a special posting of the appeal after a reasonable time for the purpose of hearing under section 421. It also appears to lay down as a rule that an appeal raising questions of fact ought not to be disposed of under section 421 without the original records being called for

1. (1924) I.L.R. 48 M. 385: 47 M.L.J. 661.

Narasimha-murti, *In re.*

from the Lower Court. If either of these two requirements was a necessary condition before action under section 421 could be lawfully taken, there would be no further question in this petition, because neither of these was done. The appeal was dismissed on the very day it was presented and it was not posted a week later for the purpose of the hearing. Also the records were not sent for. Without entering into the matter more fully, because in the nature of the conclusion at which I have arrived in this petition it is not necessary to do so, I do not think that the learned Judge intended to do more than indicate that as a rule of caution and sound procedure it is better to post an appeal for being heard even under section 421 and to send for the original papers. So far as the section itself is concerned, neither of those requisites would seem to be laid down by the words. The section says explicitly that "on receiving the petition and copy under section 419 or 420 the Appellate Court shall peruse the same and if it considers that there is no sufficient ground for interfering may dismiss the appeal summarily" and then the proviso says that "an appeal presented under section 419 should not be dismissed unless the appellant or his pleader had a reasonable opportunity of being heard in support of the appeal." In sub-clause (2) it is distinctly said that "before dismissing an appeal under the section the Court may call for the record in the case but shall not be bound to do so." In the face of this express declaration that the Court shall not be bound to send for the papers, I do not think it was intended to be laid down in the decision cited by the petitioners that the Court was bound to send for the papers before taking action under section 421. No distinction is made in the section between appeals relating to facts and appeals raising questions of law. The provision is perfectly general. Similarly as to posting the case to a subsequent date after the presentation for the purpose of being heard under section 421, the words of sub-section (1) seem to me to be plain that, so long as a reasonable opportunity is given to the appellant or his pleader to be heard in support of the appeal, there is no legal requirement as to any postponment of the hearing after the presentation of the appeal. I quite appreciate that in the great majority of cases, when an appeal is presented, neither the appellant nor his pleader may be in a position to straightway argue in support of the appeal, and therefore it may be a wise rule in proceeding under section 421 to give sufficient time to the appellant or his pleader and to inform him that he will be heard on a particular day in support of the appeal with a view to action being taken under section 421. More than that I do not think

that the section really requires, nor do I think that Mr. Justice Ramesam intended to lay down.

Narasimhamurti, *In re*

In this case, the question really is whether the petitioners' pleader had a reasonable opportunity of being heard in support of the appeal, although undoubtedly he was allowed to address some argument to the Joint Magistrate. On the whole, I have come to the conclusion that the pleader had not the required opportunity for the simple reason that he had not got all the records with him and had not fully conducted the case himself. It is not necessary to go into the slight discrepancies as to what happened between the accounts respectively given by the pleader and the Joint Magistrate. One thing, however, is clear, that whatever the pleader said may be, the Joint Magistrate conceived the idea that the occurrence took place in open daylight, whereas in fact it took place after 8 P.M. Such a hearing could not have been well informed on the part of the pleader or anything but casual on the part of the Joint Magistrate. Holding that the petitioners' pleader had not the opportunity given to him to which he was entitled under the section, the dismissal of the appeal will be set aside and the appeal will be sent back to the District Magistrate of East Godavari to be heard by him or by some other competent Magistrate other than the one who disposed of it.

S.R. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE BHASHYAM AIYANGAR.

The Official Assignee of Madras .. *Appellant**.

v.

Frank Johnson Sons & Co., Ltd., and another .. *Respondents.*

Contract—Doctrine of implied term.

The Official Assignee of Madras *v.* Frank Johnson Sons & Co., Ltd.

A stipulation not expressed in a written contract should not be implied because the Court thinks that it would be a reasonable thing to imply it. Such an implication can be made only if, on a consideration of the terms of the contract in a reasonable and business manner, the Court is satisfied that it should necessarily have been intended by the parties when the contract was made.

Hamlyn & Co. v. *Wood,* (1891) 2 Q.B. 488 and *Lazarus* v. *Cairn Line of Steamships, Ltd.*, 106 T.L.R. 378, referred to.

K entered into a contract of agency with F.J. & Co., by which in consideration of his purchasing £20,000 worth of debenture stock in

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*O.S. Appeal No. 41 of 1928. 28th July, 1930.

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another Company in which they were interested, he was appointed the sole distributing agent for the sale of their products in Madras and Ceylon for a period of ten years. The terms of the agency were defined by another memorandum but there was no undertaking by the Company to supply any products at all to the agent and no products were in fact sent. The action was brought by the Official Assignee representing the estate of *K* for damages for breach of an implied condition of the contract to supply a reasonable quantity of the products.

Held, no such obligation could be implied, as it would be inconsistent with the liberty reserved to either party to cancel the agency by three months' notice.

Rhodes v. *Forwood,* (1876) 1 A.C. 256, followed.

Turner v. *Goldsmith,* (1891) 1 Q.B.D. 544, distinguished.

This question is not in any way affected by the payment of consideration for the appointment.

On appeal from the judgment of the Honourable Mr. Justice Waller, dated the 6th day of February, 1928, in the Insolvency Jurisdiction of the High Court in Application No. 431 of 1924 in Petition No. 267 of 1923.

S. Doraisami Aiyar instructed by *V. Varadaraja Mudaliar* for appellant.

R. N. Aiyangar instructed by *Messrs. King and Partridge* for respondents.

The judgment of the Court was delivered by

Bhashyam Aiyangar, J.

Bhashyam Aiyangar, J.—This is an appeal by the Official Assignee and as such the assignee of the estate and effects of one Kancherla Krishna Rao, an insolvent, against an order of Waller, J., dismissing an application made by him in the said insolvency, for an order directing both or either of the two respondents, namely, Frank Johnson Sons & Co., Ltd. and the United Refineries, Burma, Ltd., to pay him damages for breach of agreement. The United Refineries, Burma, Ltd., the 2nd respondent, was an incorporated Company formed in 1920 by the Indo-Burma Oilfields, Ltd. and Yomah Oil Co., Ltd., who were both engaged in the production of crude oil in Burma, for erecting, maintaining and operating a refinery for crude petroleum oil and marketing the products of such refinery, and it had its registered office in Burma. Frank Johnson Sons & Co., Ltd., the 1st respondent, who apparently did business both at Rangoon and Calcutta, had been appointed the sole selling agents in India of the petrol and other products which might be produced by the 2nd respondent. The agreement which we have to consider was in writing and entered into on the 12th of December, 1921, between the present insolvent and the 1st respondent, the latter acting as selling agents of the 2nd respondent. It consisted of two memoranda, by the first of which

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Kancherla Krishna Rao undertook to purchase debenture stock in the Indo-Burma Oilfields for £20,000, and the 1st respondent, in consideration thereof, appointed him as the sole distributing agent for the sale of the products of the 2nd respondent, in the Presidency of Madras, including its Native States, French Possession and the Colony of Ceylon, for a period of ten years. The second memorandum laid down and defined the terms of this agency and fixed the rights and liabilities of the parties thereto in detail. It is common ground that Kancherla Krishna Rao paid for the debentures undertaken to be purchased by him, but no products of the 2nd respondent were sent to him for sale. It was alleged on behalf of the 2nd respondent and not disputed by the appellant, that, for some reason, the 2nd respondent was unable to produce and did not produce any petrol or other products on any commercial scale. The question now emerges and it is the only one argued before us, whether Kancherla Krishna Rao was, and the appellant, who now represents him, consequently is, entitled to hold both or either of the respondents liable in damages for their omission or failure to supply him with the products for the sale of which he obtained the sole agency.

Now, the primary question of liability undoubtedly turns on the construction of the written agreement above referred to. And that agreement, notwithstanding its formal and detailed nature, does not contain any clause imposing any obligation on either respondent to supply any products to Kancherla Krishna Rao, the agent for sale. If there was no undertaking or promise by the respondents to supply goods or products, it is obvious that no damages could be claimed by Kancherla Krishna Rao, or, the appellant, against the 1st respondent or, much less, the 2nd respondent, for any omission or failure to supply them. The learned Advocate for the appellant has contended that, although the written agreement is silent on the point, a promise for the supply of products should be read into it by implication under the circumstances of this case. When he was pressed to particularise the promise which he wanted to have implied in the agreement, with reference to the quantity of the various products and the time of their supply, he could only say that a reasonable quantity of the products produced by the 2nd respondent should have been supplied to Kancherla Krishna Rao.

Whether an implication should or should not be made in a particular case depends on and must be answered with reference

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to the special facts and circumstances thereof, but the principles which should guide us in the matter have been laid down in several leading cases. The judgment of the learned Trial Judge refers to the most important of them. The principle is well settled that a stipulation not expressed in a written contract should not be implied merely because the Court thinks that it would be a reasonable thing to imply it. Such an implication can be made only if, on a consideration of the terms of the contract in a reasonable and business manner, the Court is satisfied that it should necessarily have been intended by the parties when the contract was made. See *Hamlyn & Co.* v. *Wood*[1] and *Lazarus* v. *Cairn Line of Steamships, Ltd.*[2] Is it possible in the present case to say that, when the present insolvent and the 1st respondent entered into the contract in question, the former necessarily bargained for, or the latter held out, any definite obligation that the 2nd respondent should refine and send out to the insolvent any products of the kind referred to in the agreement? It seems impossible to answer this question in the affirmative. It will be observed that the implications sought for will be inconsistent and collide with one of the important terms in the agreement, namely, that either party was at liberty to cancel or terminate the agency by merely giving three months' notice in writing. The agreement must, no doubt, have proceeded on the expectation that the 2nd respondent would produce a large quantity of refined products and be in a position to supply Kancherla Krishna Rao with any required quantities thereof for commission sale, but the question is whether there was any and what bargain on these matters. It is not suggested that there was any negotiation or understanding as to the quantities of the products which the 2nd respondent should supply or the present insolvent should receive, or as to any other particulars regarding their consignment. This omission, no less than the absence of any stipulation in the formal agreement on such an important point, clearly cuts at the root of the implication urged on behalf of the appellant.

Going to the authorities, it may at once be mentioned that *Ogdens, Ltd.* v. *Nelson*[3] cited by the learned Advocate for the appellant does not really help us. The facts of that case were essentially different and, although there is a reference to the principle of implication in the judgment of Collins, M.R., in the Court of Appeal, the decision really turns on the construc-

1. (1891) 2 Q.B. 488. 2. (1912) 106 L.T.R. 378.
3. (1904) 2 K.B. 410.

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tion of an express stipulation, as explained, and made clear by the judgments delivered by the House of Lords in the same case on further appeal. *See* (1905) A.C. 109. Damages were granted in that case only for the breach of an *express* stipulation.

The other material cases are *Turner* v. *Goldsmith*[4] and *Rhodes* v. *Forwood.*[5] It was argued for the appellant that the facts of the present case more nearly resemble those in *Turner* v. *Goldsmith*[4], which the Trial Judge has distinguished in his judgment, than *Rhodes* v. *Forwood*[5], which has been followed by him, but we are not prepared to accept this argument. It seems to us that the present case is entirely on all fours with *Rhodes* v. *Forwood*[5]. Here, as there, the contract was one of sole agency; the agency was confined to a specified area; the agent was to sell for commission, the contract was for a fixed period determinable earlier by either party on notice and there was no express term obliging the principal to send any goods to the agent for sale in his area. The House of Lords held under these circumstances that no implied contract binding the principal to supply the agent with goods could be discovered. In the other case, *Turner* v. *Goldsmith,*[4] the facts are materially different. In the first place the relationship between the principal and the agent appears to have there approximated more to that of an employer and a servant than a manufacturer and a local commission agent for sale. Compare the observations of Phillimore, J., in *Northey* v. *Trevillion*[6]. Secondly, although the contract in that case resembles that in *Rhodes* v. *Forwood*[5] and the present case in being for a fixed term of years, there is this essential difference that, whereas in the latter the parties provided for the termination of the agency by notice even within the prescribed period, there was no such provision in the former and the contract was terminable by notice only as from the expiry of the period. Thirdly, the principal in *Turner* v. *Goldsmith*[4] employed the agent for sale not merely of the goods manufactured by him but of those which he could have procured by purchase or otherwise for sale. It appears to us, therefore, that the present case is dissimilar to *Turner* v. *Goldsmith*[4] and falls within the scope of the decision in *Rhodes* v. *Forwood*[5].

It was pressed on behalf of the appellant that the purchase of the debentures of the Indo-Burma Oilfields, Ltd., for

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4. (1891) 1 Q.B.D. 544.
5. (1876) 1 A.C. 256.
6. (1902) 18 T.L.R. 648.

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£20,000 which is recited in the agreement in question as consideration for the appointment of the present insolvent as agent makes an essential difference, but we think it has no bearing as to whether or not a stipulation to supply goods should be implied. Whether a stipulation should or should not be implied is a question relating to the construction of the agreement and does not depend on the nature of its consideration.

It must be held in the result that the order appealed against is right. The appeal is dismissed with costs (one set).

S.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

K. R. Ramaswami Aiyar and others .. *Appellants** (*Plaintiffs* 1 *to* 4)

v.

The Secretary of State for India through the Collector of Tinnevelly and others .. *Respondents* (*Defendants* 1 *to* 8).

Ramaswami Aiyar *v.* The Secretary of State for India.

Customary right—Reasonable exercise—Power of Court to limit extent—Part of communal land assigned by Government as house sites—Remaining portion not proved to be insufficient—Restriction of user—Finding as to land being communal—Interference in Second Appeal—Entry in Settlement Register—Evidentiary value.

The plaintiffs who represented a body of villagers claimed a certain plot of land as communal land used for herding cattle and as a thrashing floor. It appeared that the land was originally described at the Settlement as *Mandai* poramboke, but the Government had subsequently transferred it to the category of *Natham* poramboke. The suit plot, which was about a fifth in extent of the entire item of communal land, had been allotted by the Government as house sites and granted to certain residents of the village. It was not proved that the remaining area was not sufficient having regard to the needs of the community.

Held, that the plaintiffs' customary right was not an absolute one and the Court could, considering the altered circumstances, restrict the user to the remaining portion of the land.

Semble: In such a case not only may the extent of the land be abridged, but if there be other land more or less equally suitable, the Court may for proper reasons substitute that land for the original property.

Rule regarding reasonable exercise of customary right stated and applied.

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*S.A. No. 1323 of 1926. 5th March, 1930.

Ramaswami Aiyar *v.* The Secretary of State for India.

Mercer v. *Denne,* L.R. (1905) 2 Ch. 538 and *Bhola Nath Nundi* v. *Midnapore Zamindari Co.,* (1904) L.R. 31 I.A. 75: I.L.R. 31 Cal. 503: 14 M.L.J. 152 (P.C.), relied on.

Whether the communal character of the land has been proved is a mixed question of fact and law and if it appears that the Lower Court did not apply correct principles the High Court can interfere with its finding.

The description of certain property in the Settlement Register as *Mandai* (cattle-stand) poramboke is only *some* and not conclusive evidence that the land has been set apart for communal purposes.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, dated 25th January, 1926, in A.S. Nos. 5 and 6 of 1924 (A.S. Nos. 161 and 177 of 1923, District Court) preferred against the decree of the Court of the District Munsif, Tenkasi, dated 23rd October, 1923, in O.S. No. 440 of 1920.

B. Sitarama Rao for appellants.

The Government Pleader and *P. V. Rajamannar* for 1st respondent.

C. S. Venkatachariar for respondents 3 to 8.

The Court delivered the following

JUDGMENT.—This appeal raises an important question regarding customary rights. The plaintiffs are inhabitants of a village known as Melagaram in the district of Tinnevelly. They have filed the suit under O. 1, R. 8, Schedule I, Civil Procedure Code, as representing the whole body of the villagers. They claim the suit land of the extent of 1 acre and 95 cents to be communal land and allege that it has been, so far as living memory goes, used for certain communal purposes. In the plaint, the purposes are thus set out:

1. for herding cattle,
2. for grazing of cattle,
3. as a cart track,
4. as a thrashing floor,
5. as a burial ground for Brahmin children, and
6. as a seat of the guardian deity.

The plaintiffs strongly rely upon the fact that at the Settlement of 1875 and again at the Re-settlement of 1911, the land was classed as *Mandai* (cattle-stand) poramboke. In 1918, the land was transferred by the Government from the category of *Mandai* poramboke to *Natham* poramboke. The 1st defendant is the Secretary of State. The defendants 2 to 8 are persons belonging to the Potter community, who have built huts on sites granted to them by the Government out of the suit land. The District Munsif has held that the customary right has been

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proved in regard to three out of the six uses referred to in the plaint, namely, (1) for herding cattle, (2) as a thrashing floor, and (3) as a seat of the guardian deity. I may remark that the other uses alleged by the plaintiffs do not require serious notice. The Subordinate Judge seems to find (though his finding is not express) that the communal nature of the land has not been proved. In any event, he appears to think that at the most, the only use by the community that can be said to have been made out is that of a cattle stand. This he infers from the fact that the land was described only as *Mandai* poramboke and no other purpose was mentioned in the Settlement Registers. First, as regards the stone image, I am not prepared to hold that it is an object of public worship. The image is an exposed one and is within the land granted to defendants 2 to 8. They have no objection to the plaintiffs removing the image from the land.

Then remain two purposes of those mentioned, namely, (1) for herding cattle, and (2) as a thrashing floor. The Subordinate Judge is disposed to discredit the plaintiffs' version, as their conduct is inconsistent with their case. Several persons belonging to their party had themselves applied for grants of house sites out of the plot in question. The first application was made so far back as 1908. Again in 1918, subsequent to the classification of the land as *Natham* poramboke, several requests were made by them for grant of sites. The Subordinate Judge argues that this can hardly be the conduct of persons conscious of the right now put forward. He has accordingly dismissed the suit.

Mr. Sitarama Rao for the plaintiffs attacks the judgment of the Lower Appellate Court. He first relies upon *Kuar Sen* v. *Mamman*[1] for the position that the English rule does not apply, namely, that in the case of a customary right, it must be shown to have been immemorial. I agree; for, it may now be taken as settled, that no fixed period of enjoyment is laid down by law as necessary to establish such a right. (See *Palaniandi Thevan* v. *Puthirankonda Nadan*[2], which follows the Allahabad case.) Mr. Sitarama Rao next distinguishes *Collector of Godavari District* v. *Pedda Rangiah*[3] and *Taluk Board, Dindigul* v. *Venkataramier*[4] on the ground that those cases related

1. (1895) I.L.R. 17 A. 87. 2. (1897) I.L.R. 20 M. 389.
3. (1903) 4 M.L.T. 440.
4. (1923) I.L.R. 46 M. 866: 45 M.L.J. 333.

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to *Natham* poramboke, whereas the plot with which we are concerned is *Mandai* poramboke. As regards *Natham* poramboke, Benson and Bhashyam Aiyangar, JJ., observe thus in the first mentioned case:

> "They throw rubbish on it, graze their cattle on it, use it as a latrine, and the like, and they are rarely interfered with. But it is always understood that this use is permissive on the part of Government, and that Government has the right at any time to appropriate it for any special public purpose or grant it to an individual for building purposes."

In the second case, Mr. Justice Ayling remarks that where the land is *Natham,* the enjoyment is patently of a permissive kind and cannot give rise to any customary right. Mr. Sitarama Rao's contention is this. When the Government describes a particular plot of land as *Natham* poramboke, it declares in terms that it is building site, that, in such a case, any different mode of enjoyment, however long, may be presumed to be permissive in its origin and that the Government may, at its pleasure, resume, as it were, such land and dispose of it as it likes; but, argues the learned counsel, the very description of the land in the present case as *Mandai* poramboke involves a recognition on Government's part that it is a cattle stand, and the cases cited, therefore, do not apply. There is force in this contention, but, as the learned counsel himself admits, the description in the Settlement Register is only *some,* and not conclusive evidence, that the land has been set apart for that purpose. Whether the communal character of the land has been proved is a mixed question of fact and law, and if I thought that the Lower Court did not apply correct principles, I would interfere with its finding; but I consider it unnecessary to pursue this, having regard to my view on the next point, with which I shall proceed to deal.

That point arises thus. The suit plot is Survey No. 71 and measures 1 acre, 95 cents. The extent granted to the potters is 41 cents, or, roughly a fifth of the total land. There is thus a balance of more than an acre and a half available for being used as cattle stand or thrashing floor, as the case may be. It is not pretended that this area is insufficient, having regard to the needs of the community. Moreover, there is another plot in the village, Survey No. 76, measuring 2 acres, 77 cents. Regarding this the Collector observes, that it is just a few yards from the suit plot, that it is fit for being used as cattle stand and thrashing ground and that the potters' houses need not therefore be removed from the site in question. Is the plaintiffs' customary right then an absolute one, in the sense

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that it has to remain intact and inviolate through all time, irrespective of changed conditions or circumstances? The answer is, in my opinion, decidedly in the negative. Is a right, say of free pasturage, acquired at some remote era by a village, once thickly inhabited, to continue undiminished or unaffected, even after it has become a dwindling hamlet? Supposing its right extended at one time to 10 acres, must it remain undiminished through all time, even though the village has declined? It is stated in Halsbury:

> "The nature of the right enjoyed, and also the extent of the land over which it is exercised, are capable of reasonable modification and extension"—Vol. X, p. 236.

A very clear exposition of the doctrine is contained in the judgment of Farwell, J., in *Mercer* v. *Denne*[5] (affirmed by the Court of Appeal in *Mercer* v. *Denne*[6]). In that case, certain fishermen claimed a right to spread their nets and dry them on the beach ground of the defendant, a private owner. On behalf of the latter, it was argued that the plaintiffs may dry their nets only on the condition of fishing for such fish and at such times and with such nets as the fishermen in the reign of Richard I used to do. Farwell, J., observes that if this contention is sound, "All improvements and progress are debarred." Its effect, the learned Judge remarks, "is to discard the kernel for the shell, and might result in making an arrangement that was in its inception reasonable, because of public benefit, become actually injurious to public interests."

A custom derives its validity from its being very reasonable in its inception. By the expression "that it is reasonable" is meant, that it is for the benefit of the Commonwealth. Can, then, a customary right, reasonableness being of its very essence, be so exercised as to be injurious to public interests? Care must be taken not to confuse reasonableness, an essential element of a valid customary right, with reasonable exercise of that right. The word "reasonable" in one case refers to the origin of the right; in the other, to the present exercise of it. The distinction is brought out very clearly in the judgment of Tindal, C.J., in *Tyson* v. *Smith*[7] cited by Farwell, J.:

> "It is obvious that this is not an argument against the custom being reasonable in its original commencement . . . . it is an objection only as to the mode of exercising the right so claimed. . . . ."

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5. (1904) 2 Ch. 534.
6. (1905) 2 Ch. 538.
7. (1838) 48 R.R. 539: 112 E.R. 1265.

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That the contention that the right is absolute and inviolable is unsound, appears again from the observations of Lord St. Leonards in *Dyce* v. *Hay*[8] also relied on by Farwell, J.:

"There is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles......................The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles."

Thus, the fishermen were allowed to exercise their rights *according to the varying exigencies of the fishing industry and the requirements of improved nets.* (Page 549.) This decision also shows that the right or obligation, as the case may be, is not one-sided but reciprocal. The right of the fishermen to reasonably vary the mode of enjoyment is recognised, as I have said, in the portion of the judgment to which I have referred. But what of the right of the land owner? In that case, it was urged that there was a gradual accretion by the receding of the sea and that the fishermen were not entitled to exercise their rights over the added extent. This contention was rejected. But, then, it was hypothetically argued, supposing there were now a mile or more of such accretion, would the plaintiffs be still entitled? Farwell, J., answers, in the first place, it would hardly be possible to get evidence of actual user over more than the fringe near the sea and in that case "the extent of the custom could be limited by such user"; but granting that such user could in fact be shown, even then "the landowner's right of free enjoyment would only be limited by a reasonable exercise of customary rights and it would probably be held unreasonable to insist on drying nets over a large tract of land." Of the cases referred to at the Bar, no case, I think, contains a clearer statement than this, of the principle in regard to the *reasonable exercise* of a customary right.

This is consistent with the view taken by the Judicial Committee, of the law in this country, regarding customary rights. In *Bholanath Nundi* v. *Midnapore Zamindari Co.*[9] the plaintiffs, resident cultivators of village belonging to the defendants, the proprietors of an Indigo concern, claimed a right of free pasturage over the waste lands of the villages. Their Lordships, while upholding the claim, guard themselves by saying that it will be advisable to insert a provision, that the decree should not prevent the defendants from improving their property

8. (1852) 1 Macq. 305 at 312.
9. (1904) L.R. 31 I.A. 75: I.L.R. 31 C. 503: 14 M.L.J. 152 (P.C.).

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provided sufficient pasturage were left. That this is not a casual remark, is shown not only by the judgment but also by the point having been expressly raised in the argument of the respondents' counsel. This case is referred to and followed in *Syed Ali* v. *Sarjan Ali*[10]. The learned Judges observe:

"But if there is nothing to show that the land in suit differs in any respect from other waste and if there is plenty of pasturage left in the village, the plaintiffs are not entitled to relief."

They also refer (as a circumstance to be considered) to the possibility of the cattle having to be driven to an unreasonable distance in order to obtain pasture. The principle recognised in these cases was again applied in *Kartar Singh* v. *Ralla*[11], where the judgment shows that the Court may have regard in deciding what is reasonable exercise to changing and fluctuating circumstances.

I may lastly point out, that the limitation is *not only quantitative*; that is, not only may the extent of the land affected be abridged, but, if there be other land more or less equally suitable, the Courts may, for proper reasons, substitute that land for the original property. The cases to which I have referred deal with private owners of lands, but the reasoning applies even with greater force to a case like the present, where the Government as the party affected, is under a clear duty to have regard to public interests under changing conditions.

The second appeal fails and is dismissed with costs (two sets).

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE BHASHYAM AIYANGAR.

M. Namberumal Chetty ... *Appellant** (*Defendant*).

v.

M. Nainiappa Mudali ... *Respondent* (*Plaintiff*).

Namberumal Chetty v. Nainiappa Mudali.

Criminal Procedure Code (*V of* 1898), *Ss.* 476, 476-*B*—*Appeal—Complaint by Court suo motu—Finding by necessary implication.*

The words "such a complaint" in S. 476-B are not confined to complaints on application by some party. Even complaints made by the Court of its own accord are appealable.

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*O.S.A. No. 39 of 1929. 31st July, 1930.

10. (1913) 18 C.W.N. 735. 11. (1919) 67 I.C. 306.

Namberumal Chetty v. Nainiappa Mudali.

Under S. 476 it is not necessary there should be an express finding to the effect that an enquiry is expedient in the interests of justice. Such a finding may be implied in the complaint itself.

Bhuban Chandra Pradhan v. *Emperor*, (1927) I.L.R. 55 Cal. 279, referred to.

On appeal from the order of the Honourable Mr. Justice Beasley, dated 25th January, 1929, filing a complaint under section 476, Code of Criminal Procedure, charging the appellant under section 193, Indian Penal Code, in respect of the evidence given by him at the trial of C.S. No. 250 of 1926 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

Appellant not represented.

Subramaniam and *Rajagopal* for respondent.

The judgment of the Court was delivered by

Curgenven, J.

Curgenven, J.—This is an appeal against an order of Beasley, J., as he then was, under section 476, Criminal Procedure Code, making a complaint under section 195 (*i*) (*b*) of the same Code against one M. Namberumal Chetty in respect of an offence punishable under section 193 of the Indian Penal Code. The appellant is not represented before us. We have perused his memorandum of appeal and the order of the learned Judge and we have heard the learned advocate for the respondent, who has raised the preliminary point that no appeal will lie in the circumstances of this case.

The complaint was filed not at the instance of any applicant but *suo motu* by the learned Judge, and the learned advocate's argument is that in such circumstances the terms of section 476-B do not provide for an appeal. As an authority for this position he refers us to *Mt. Satto* v. *Emperor*[1], which is a decision by a single Judge of the Lahore High Court based upon what he terms the genesis of the present section. He appears to read the words in that section "such a complaint" as meaning not merely a complaint under section 476 or 476-A but, further, a complaint on an application by some person; but we are of opinion that any analogy which is to be drawn between the terms of the present sections and those of the corresponding sections of the old Code is likely to be misleading inasmuch as the procedure has been radically altered and whereas, under the old Code, a Court could give sanction to prosecute and that sanction to prosecute on application could be made the subject of an appeal, all that has now been swept away and it is for the Court itself in all cases, whether of its

1. (1928) 30 Cr. L.J. 163.

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Curgenven, J.

own accord or on application, to make a complaint. We cannot see accordingly why the appealability of an order should depend upon the special circumstances of an application having been made; nor do we think that the terms of the section itself support that view.

Coming to the merits, the learned Judge has delivered a very detailed and comprehensive order containing all the materials from which the offence in his view may be established; and the only criticism that we can discover in the grounds of appeal is that under the terms of section 476 there should be not only a finding to the effect that it is expedient in the interests of justice that an inquiry should be made but also a complaint. In the present case it appears that the proceedings are embodied in a single document. But we think that that document itself serves the dual purpose of a finding and also of a complaint, because a mere perusal of it will show that the learned Judge has set forth the particulars in respect of which he considers that false evidence was given and the nature of the proofs that that evidence is in fact false and, since these particulars serve the double purpose of a finding and a complaint, we see no reason why they should not be held sufficiently to comply with the requirements of the section, although in that form.

We have been referred to one case, *Bhuban Chandra Pradhan* v. *Emperor*[2], where the objection was raised that the learned Judge who made the complaint had not recorded a finding that it was expedient in the interests of justice to complain, and this was disposed of with the observation that

"the order showed clearly the learned Judge's opinion that the appellant had given false evidence before him. That order by itself, and in view of the proceedings started under section 476 of the Criminal Procedure Code, carries the implication that the learned Judge must have felt that the ends of justice required that an inquiry before a Magistrate should take place."

We think that the same implication is clearly to be gathered from the order which the learned Judge has passed in this case; and we can find no grounds for interfering with it in appeal. The appeal is accordingly dismissed.

S.R. *Appeal dismissed.*

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2. (1927) I.L.R. 55 C. 279.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Appaswami Mudali .. *Petitioner** (*1st accused*).

Appaswami Mudali, *In re.*

Criminal Procedure Code (V of 1898), *Ss.* 110 (*a*), (*d*), (*e*) *and* (*f*) *and* 117 (5)—*Joint trial—Irregularity of.*

Three persons were jointly tried by a Sub-divisional Magistrate for being associates in a course of criminal conduct under S. 110 (*a*), (*d*), (*e*) and (*f*) of the Criminal Procedure Code, since S. 117 (5) of the same Code clearly gave the Magistrate, if he thought it just, the power to deal with all the accused in the same enquiry.

Held, that there was no error or irregularity in the Magistrate dealing with them together, provided the evidence of reputation admitted against them was not against each accused separately but against all together.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, South Arcot Division, in Criminal Appeal No. 3 of 1930, preferred against the order of the Court of the Sub-divisional Magistrate of Chidambaram in Mis. Case No. 17 of 1929.

P. Viswanatha Aiyar for petitioner.

The Court made the following

ORDER.—It is urged that the joint trial of the petitioner with two other persons who did not appeal to the Sessions Judge and have not applied to this Court was illegal.

The allegation against them was that all the three of them were together associates in a course of criminal conduct such as to bring them under clauses (*a*), (*d*), (*e*) and (*f*) of section 110 of the Criminal Procedure Code. In such cases section 117 (5) clearly gave the Magistrate, if he thought it just, the power to deal with all the accused in the same enquiry. But it is said that joint enquiries under section 117 are not legal where part of the enquiry is under clause (*f*) of section 110 and for this the decision in In re *Kutti Goundan* [1] which itself cites *Hari Telang* v. *Queen-Empress*[2] is relied upon. There is a sentence in the latter decision which is incorporated into the former to the effect that there can be no connection between them (the accused) in regard to their

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*Cr. Rev. Case No. 472 of 1930. 28th July, 1930.
Cr. Rev. P. No. 436 of 1930.

1. (1924) 47 M.L.J. 689.
2. (1900) I.L.R. 27 C. 781.

Appaswami Mudali, *In re.*

characters so as to make them dangerous persons." But this was not the ground of decision in those cases which were decided on the ground that where several accused are being jointly tried under section 110 evidence of misdeeds against each of them singly should not be admitted against the others as this will naturally prejudice these others. And Walsh, J., makes this clear in *Empress* v. *Angnu Singh*[3]. More than this I think none of the cases cited before me go and I find myself unable to agree to the general proposition that where proceedings are taken under section 110 (*f*) several persons should not be dealt with together. The evidence of reputation admitted against them should, of course, not be against each accused separately but against them all together.

In this case as the judgment of the learned Sessions Judge shows, the evidence was clear that the petitioner along with the other two men were pursuing a course of extortion and terrorising for which they were all equally responsible and on which they had jointly earned the evil reputation to which several respectable witnesses spoke.

I can see no error or irregularity in the trial. The petition is dismissed.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Seemakurti Kanakayya .. *Petitioner** (*Accused*).

Seemakurti Kanakayya, *In re.*

Criminal Procedure Code (*V of* 1898), *Ss.* 222 (2) *and* 403—*Scope of —Separate charges for separate amounts misappropriated—Validity.*

S. 222 (2) permits the consolidation of a number of separate charges as a matter of convenience. The only effect of the section is that where the accused has once been tried for the misappropriation of a gross sum between specified dates, he cannot be put on trial in a subsequent case for the other amounts alleged to have been misappropriated during the same period. But no such consolidation is compulsory and there is nothing to prevent separate charges being framed in respect of separate amounts misappropriated.

Emperor v. *Kashinath Bagaji Sali,* (1910) 12 Bom. L.R. 226 and *Nagendra Nath Bose* v. *Emperor,* (1923) I.L.R. 50 Cal. 632, followed.

In re *Appadurai Aiyar,* (1915) 32 I.C. 158, distinguished.

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*Cr. Rev. Case No. 122 of 1930. 12th August, 1930.
Cr. Rev. P. No. 114 of 1930.

3. (1922) I.L.R. 45 A. 109 at 111.

Seemakurti Kanakayya, *In re.*

The Court has, no doubt, the power in an appropriate case, to stop a second trial for misappropriation if it was shown to be oppressive or an abuse of the process of the Court.

Sidh Nath Awasthi v. *The Emperor*, (1929) 49 C.L.J. 378, referred to.

Held, no occasion for the exercise of such a power arose in the present case.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Sessions of West Godavari Division at Ellore in Criminal Revision Petition No. 26 of 1929 preferred against the order of the Court of the Sub-divisional Magistrate of Ellore in C.C. No. 82 of 1929.

P. V. Rajamannar for *P. Venkataramana Rao* for petitioner.

N. S. Mani for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The only point argued in this petition is that the petitioner against whom charges under sections 408 and 477-A have been framed in C.C. No. 82 of 1929 now pending against him cannot be tried or convicted for those offences because the petitioner was in a previous case filed by the same complainant, namely C.C. No. 84 of 1928, tried and convicted for criminal breach of trust in respect of sums collected within the same period as that covered by the alleged offences in this case.

The facts are as follows: The petitioner was a clerk under the complainant who is a trader in paddy and rice. The duty of the accused was to sell rice, collect the price from his customers and pay the amounts collected to the complainant and keep correct accounts of all receipts. In C.C. No. 84 of 1928 the petitioner was charged with having received sums of money on two days, namely Rs. 60 on 10th August, 1928, and two sums of Rs. 16-12-0 and Rs. 54-4-9 on 24th September, 1928 and misappropriated the same without properly bringing them into account. For this he was tried and convicted in that case. The present complaint which was subsequently filed and which is pending was in respect of three amounts, namely Rs. 20 collected on 14th August, 1928, Rs. 21 collected on 5th March, 1928 and Rs. 5 collected on 22nd March, 1928. Although the charge was framed originally in respect of the three above amounts, it appears that the charge in respect of the amounts collected on 5th March, 1928 and 22nd March, 1928, have been

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struck out, so that the only charge now pending against the petitioner is that in respect of money collected on 14th August, 1928.

The petitioner's argument is that he having been previously convicted for criminal breach of trust in respect of amounts collected on the 10th August and 24th September, 1928, cannot now be tried again for criminal breach of trust in respect of an amount collected on an intermediate date, namely, the 14th August, 1928. This argument is sought to be based on section 403 read with section 222 (2) of the Criminal Procedure Code. Reliance was also placed upon a decision of this Court reported in In re *Appadurai Aiyar*[1] and a decision of the Calcutta High Court in *Sidh Nath Awasthi* v. *The Emperor*[2]. The Public Prosecutor on the contrary relies upon the case in *Nagendra Nath Bose* v. *Emperor*[3], following the decision in *Emperor* v. *Kashinath Bagaji Sali*[4] If the decision of this Court in In re *Appadurai Aiyar*[1] is applicable I am bound by it. But it seems to me that it is not applicable to the facts of this case. From the report it seems that in that case there was a previous trial of the same accused for misappropriation of a gross sum between two dates. The accused was thereafter charged for misappropriation of another gross amount not included in the first amount but misappropriated on dates within the same period. In those circumstances the Court held that the intention of the legislature in enacting section 222 of the Criminal Procedure Code is that where there is to be a trial for misappropriation of a gross sum there should be only one trial for all such offences committed within the period covered by the defalcation. The charge in the previous case in such circumstances should be taken to include all the items misappropriated by the accused during that period, and therefore the accused cannot be put on trial in a subsequent case for other amounts alleged to have been misappropriated during the same period. That decision has no bearing to this case because the former case against this petitioner was not for misappropriation of a gross sum misappropriated within two dates but was for misappropriation of specific sums of money received on specific dates. Where that is the case section 222 (2) of the Criminal Procedure Code does not come into play at all. All that the section in my opinion says is that

1. (1915) 32 I.C. 158.
2. (1929) 49 C.L.J. 378.
3. (1923) I.L.R. 50 C. 632.
4. (1910) 12 Bom. L.R. 226.

instead of charging the accused under separate counts for defalcation of each particular amount separately received and misappropriated which is the general rule laid down in section 234, an exception is made, necessitated by convenience, that all the defalcations within a year may be joined together and the total amount of defalcation and the dates within which the defalcation took place need alone be mentioned in the charge and a charge so framed is to be deemed to be a charge for one offence within the meaning of section 234. This does not mean that, if that is more convenient, separate counts should not be charged for separate amounts misappropriated on different dates. In other words, section 222 (2) is an enabling provision which permits what otherwise would be a large number of separate charges to be joined together for the purpose of convenience. Nowhere is it prescribed that separate charges in respect of separate amounts misappropriated shall not be resorted to and that if an accused has misappropriated several sums within a year they all should be added together and made into one gross sum and tried as one charge. All that the decision in In re *Appadurai Aiyar*[1] means is that where a trial of misappropriation of a gross sum within an interval of time has already taken place, the prosecution cannot be heard to say that certain items of misappropriation were left out from the gross sum first charged or to bring fresh cases on those omitted amounts. As the learned Judges say, in such a case the charge in the previous case should be taken to include all the items misappropriated by him in the course of the same transaction during that period. As that decision has no application to this case I need not further consider it.

The decision in *Sidh Nath Awasthi* v. *The Emperor*[2] is really against the petitioner's contention. There the prosecution knowing well what was the gross sum in respect of which an accused had committed criminal breach of trust elected to proceed on three separate items and got the accused convicted. Then they picked up three other items and got the accused tried a second time and convicted. The Court says that though section 403, Criminal Procedure Code, may not strictly apply in terms to a case like this, still there is abundant authority for the view that a second trial in circumstances such as this ought not to have been allowed to be held, by which I understand that the High Court would, in an appropriate case, stop the

1. (1915) 32 I.C. 158. 2. (1929) 49 C.L.J. 378.

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trial if it was shown to be oppressive or an abuse of the process of the Court. But so far as the legality of the conviction was concerned, the Court held that there was nothing illegal in it and contented itself with reducing the sentence. This decision does not support the argument of the petitioner that the trial is illegal. It only says that in an appropriate case this Court has power to stop the trial as oppressive and an abuse of the process of the Court. The decision in *Emperor* v. *Kashinath Bagaji Sali*[4] is a direct authority against the petitioner. There the accused was tried for the offence of criminal breach of trust as a public servant in respect of Rs. 12 and odd and was acquitted. He was again tried for the same offence in respect of another sum of Rs. 19 misappropriated during the same period as that to which the Rs. 12 related and was convicted. The Sessions Judge acquitted the accused on the ground that his previous acquittal was a bar to the second trial. The High Court of Bombay reversed the order of acquittal holding that the previous acquittal did not operate as a bar to the accused's conviction at the second trial. This was followed by the two learned Judges of the Calcutta High Court in the decision reported in *Nagendra Nath Bose* v. *Emperor*[3]. On the authorities there is no ground for the petitioner's contention that having regard to the form of the charge in the former case the charge now pending against him cannot be heard.

Nothing has been urged at the hearing to show that this is a fit case in which the trial should be stopped to prevent the abuse of the process of the Court under section 561-A. The complaint stated that the complainant did not, when he brought the former case, know that the accused had misappropriated the sums now charged. I have not been shown that this is untrue. I, therefore, see no reason to interfere and dismiss this petition.

S.R. *Petition dismissed.*

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3. (1923) I.L.R. 50 C. 632. 4. (1910) 12 Bom. L.R. 226.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRIAR AND MR. JUSTICE REILLY.

The Pannaji Devi Chand, a Marwadi Firm and Company at Gadag, consisting of the following partners Punnamchand and others .. *Appellants** (*Defendants*)

v.

The Firm of Senaji Kapur Chand at Bellary .. *Respondents* (*Plaintiffs*).

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Limitation Act (IX of 1908), *Ss.* 9, 14, 23 *and Art.* 29—*Wrongful seizure—If a continuing wrong—Starting point of limitation—Time taken in setting aside—If can be excluded—Art. 29—Scope of.*

(*i*) Wrongful seizure of moveable property is not a continuing wrong within the meaning of S. 23 of the Limitation Act.

(*ii*) Art. 29 applies to all cases of attachment before judgment where specific property is wrongfully seized and limitation begins to run from the date of seizure and not from the date when the seizure is declared wrongful by the Court. It is not permissible, having regard to the plain provisions of the Article, to read into the third column anything that would make the starting point a different one.

Hughes v. *The Chairman of the Municipal Commissioners of Howrah*, (1873) 19 W.R. 339 and *Narasimha Rao* v. *Gangaraju*, (1908) I.L.R. 31 M. 431: 18 M.L.J. 590 (F.B.), followed.

(*iii*) The period during which the proceedings regarding the attachment were pending cannot be excluded in computing the period of limitation. *Murugesa Mudaliar* v. *Jattaram Davy*, (1900) I.L.R. 23 M. 621; *Narasimha Rao* v. *Gangaraju*, (1908) I.L.R. 31 M. 431: 18 M.L.J. 590 (F.B.), followed.

(*iv*) No distinction can be drawn between cases where the property of the defendant is attached and cases where the property of third parties is attached. Both the cases fall under Art. 29.

Manavikraman v. *Avisilan Koya*, (1895) I.L.R. 19 Mad. 80: 6 M.L.J. 11, *Sokkalingam Chetti* v. *Krishnaswami Aiyar*, (1919) 38 M.L.J. 324, *Arjun* v. *Abdul*, (1921) 35 C.L.J. 480 and *Manga* v. *Changa Mal*, (1924) 22 A.L.J. 977, not followed.

(*v*) Article 29 is not limited to claims for consequential damages; it is applicable as well to suits to recover the value of the property seized. *Murugesa Mudaliar* v. *Jattaram Davy*, (1900) I.L.R. 23 M. 621, referred to.

(*vi*) Art. 29 would apply both to cases of seizure under orders passed by a Court without jurisdiction and to cases of seizure under orders passed by a Court having jurisdiction but on insufficient grounds. The word "wrongful" is wide enough to cover both. *Arjun* v. *Abdul*, (1921) 35 C.L.J. 480, not followed.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Bellary in O.S. No. 2 of 1924 (O.S. No. 98

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*Appeal No. 211 of 1925. 6th February, 1930.

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of 1921 on the file of the late Sub-Court of Bellary and O.S. No. 11 of 1922 on the file of the District Court of Bellary).

V. S. Narasimhachari for appellants.

C. Sambasiva Rao for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS. *Kumaraswami Sastri, J.*—Defendants are the appellants. This appeal arises out of a suit filed by the plaintiff firm against the defendant firm claiming a sum of Rs. 10,000 as damages which the plaintiffs alleged they sustained by reason of the defendants having wrongfully attached before judgment the properties in the defendant firm.

The plaintiffs and the defendants were merchants who were carrying on business in partnership. The plaintiffs were carrying on business at Bellary and the defendants were carrying on business at Gadag. It is alleged that the plaintiffs filed a suit in the Bellary District Court for winding up the business and for taking accounts. The defendants brought a suit against the plaintiffs and two other firms in the Court of the 1st Class Subordinate Judge of Dharwar for a breach of contract claiming Rs. three lakhs twelve thousand odd. The defendants filed an affidavit on the 30th of March, 1920, and applied for attachment before judgment of certain properties of the plaintiffs in Bellary and obtained a conditional order. The Subordinate Judge after hearing the parties confirmed the attachment before judgment on the 21st of April, 1920, and ordered the plaintiffs to give security on failure of which the attachment was to continue. It is alleged in the plaint that both in getting this order and in carrying out the attachment the defendants were guilty of various acts of misconduct. The plaintiffs appealed to the High Court of Bombay against the order of the Subordinate Judge and the High Court reversed the order of the Subordinate Judge holding that the defendants did not establish any proper grounds for the attachment before judgment. The judgment of the Bombay High Court is reported in *Sennaji Kapur Chand* v. *Pannaji Devichand*[1].

The defendants filed a written statement stating that they acted *bona fide*. They denied that in carrying out the attachment they acted in any illegal manner as alleged in the plaint. They denied that the plaintiffs were entitled to any damages and stated that the suit was barred by limitation.

1. (1921) I.L.R. 46 B. 431.

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The Subordinate Judge held that the plaintiffs did not prove the various acts of misconduct alleged in the plaint, but he was of opinion that the plaintiffs were entitled to damages on the ground that the attachment was not obtained *bona fide*. He observed:

"In the result I find that the attachment made from the 10th to 12th April, 1920, was malicious in the sense that it was sought not under an apprehension that the plaintiffs were closing the shop to defeat the debt due to the defendants but in order that it may be easy for the defendants to realise their moneys in case they obtained a decree."

As regards damages, he awarded Rs. 3,000 damages and directed the parties to pay and receive proportionate costs. As regards limitation, the point was considered by the District Judge before the suit was transferred to the Subordinate Judge and the District Judge on the authority of *Manavikraman* v. *Avisilan Koya*[2] was of opinion that, where the moveables of the defendants were attached before judgment, the seizure cannot be regarded as wrongful and that Art. 29 did not apply. The District Judge applied Art. 49 and as the date of the seizure was the 9th of April, 1920, *i.e.*, within three years before the suit he held that the suit was in time. The Subordinate Judge said that that ruling concluded the matter but he also added that as it was necessary for the plaintiffs to prove that the prior proceedings terminated in their favour, limitation began to run from that date, that the attachment was a continuing wrong and that S. 23 of the Limitation Act would apply. Hence the appeal.

In appeal, it is contended that the suit is barred by limitation and that the Judge was wrong in holding on the facts that the attachment before judgment was obtained maliciously and without reasonable cause and that in any event the damages are excessive.

As regards limitation, I am of opinion that the suit is barred by limitation. The order of the Subordinate Judge of Dharwar was on the 31st of March, 1920, and the attachment is said to have been on the 10th and the 11th of April, 1920. The suit was filed on the 26th of October, 1921. The suit was one for damages for obtaining a wrongful attachment of the properties of the plaintiffs.

Art. 29 of the Limitation Act runs as follows:—

"For compensation for wrongful seizure of moveable property under legal process—one year—the date of the seizure."

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2. (1895) I.L.R. 19 M. 80: 6 M.L.J. 11.

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It is contended by the appellants that this case falls within Art. 29, that the suit is for compensation for wrongful seizure of moveable property under legal process, that the period is one year commencing from the date of the seizure, that according to the allegations in the plaint, the seizure was wrongful from the date when the property was seized, that the fact that it was held to be wrongful by the High Court of Bombay on the 14th of September, 1921, does not convert a proper seizure into an improper seizure and that consequently the date of the order of the High Court of Bombay has nothing to do with limitation. It is also argued that seizure which is wrongful is not a continuing wrong within Art. 23 of the Limitation Act.

For the respondents it is argued that there is a difference between cases where the property of the defendant is attached and cases where the property of third parties is attached, that Art. 29 only applies to cases where the property of third parties is attached, and that if the property of the defendant is attached the proper article would be Art. 36, which provides for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specially provided for by the Limitation Act and a period of two years is prescribed, the period commencing from the date when the malfeasance, misfeasance or non-feasance takes place, or Art. 49, which provides for compensation for wrongfully taking or injuring or wrongfully detaining movable property where three years is the period of limitation beginning from the time when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. It is also argued that wrongful attachment is a continuing wrong until the property is released from attachment in which case the suit was not barred by limitation as it is admittedly within one year of the release order of the High Court setting aside the attachment. It is also contended that as in actions for malicious attachment under legal process the termination of the proceedings is necessary, limitation begins to run only from the termination of the proceedings or the period when the proceedings were going on should be excluded in computing the one year.

The difficulty of applying either of the Arts. 36 or 49 is that before these articles can be attracted it has to be shown that the specific Art. 29 which applies to suits for compensation for wrongful seizure of movable property under legal process is not applicable. I do not think it can be held that wrongful seizure of moveable property is a continuing wrong. No

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doubt the party is deprived of the possession and use of the property during the period it is taken out of his possession, but it seems to me that that does not make it a continuing wrong within the meaning of section 23.

No authority has been cited for holding that in such actions limitation does not begin to run until the plaintiff obtains a restoration of the property. I do not think the wrongfulness or otherwise of the seizure depends upon the adjudication of the Court on an objection taken by the person whose property is attached. If, unless certain facts are alleged and proved, the attachment is an invasion, the wrongful nature of the attachment does not depend upon the adjudication of the Court on the objection. It is not rightful when the Court makes an order on allegations which are subsequently found to be unproved and become wrongful only when the Court on investigation of the facts holds that the plaintiff had no justification in attaching the properties. It is wrongful *ab initio*.

As regards the argument that there is no cause of action until the attachment has been declared to be wrongful and that the plaintiff must allege and prove the termination of the proceedings in his favour, the effect of upholding this contention would be to read into Art. 29 words that are not there. The period of limitation runs from the date of the seizure and not from the date when the seizure is declared wrongful. It should be noted that in other articles where termination of proceedings is necessary to give the plaintiff a cause of action, the Limitation Act specially provides for that contingency. For example, in Art. 19 which refers to compensation for false imprisonment, the period of limitation begins to run from the date when the imprisonment ends. In Art. 23 which refers to compensation for malicious prosecution, the period of limitation runs from the date when the plaintiff is acquitted or the prosecution is otherwise terminated. In Art. 42 which refers to compensation for injury caused by an injunction wrongfully obtained, the period of limitation is three years commencing from the time when the injunction ceases. The legislature has however in dealing with compensation for wrongful seizure of moveable property under legal process fixed the period as one year from the date of seizure. I may also point out that Art. 28 which refers to compensation for illegal, irregular or excessive distress gives one year from the date of the distress. Having regard to this marked distinction I do not think I would be justified in reading into Art. 29 words which are not there.

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And even assuming for purposes of argument that it is necessary in case of compensation for wrongful attachment to allege and prove that the attachment proceedings have been terminated in favour of the plaintiff, it is difficult to see how the period during which the proceedings regarding the attachment are alleged to be pending can be excluded. Under section 9 when once time has begun to run, no subsequent disability or inability to sue stops it and none of the sections in Part III of the Limitation Act relating to computation of period of limitation have any application to cases like the present. I find it difficult to see why any distinction should be drawn between cases where the property of the defendant is attached and cases where the property of third parties is attached. Both the cases fall under Art. 29. There is wrongful seizure of movable property under legal process and the seizure is no less wrongful because it is the property of the defendant. The distinction to my mind is purely artificial. The hardship is the same.

Turning to the authorities, there are no doubt some cases which draw this distinction, but there are other decisions where Art. 29 has been applied to cases where the defendant's property has been distrained or attached.

In *Hughes* v. *The Chairman of the Municipal Commissioners of Howrah*[3] the suit was for the recovery of damages on account of a fine imposed by the Municipality of Howrah and the detention of an omnibus. The fine was set aside by the High Court and the detention pronounced to be wrongful. The question was as to when the cause of action arose and as to the period of limitation, the Calcutta Municipal Act giving a period of three months. Sir Richard Couch, C.J., observed:

"The cause of action was the seizure of the omnibus, which took place on the 5th of July. Either that seizure was a lawful one by virtue of proceedings to recover the fine which had been legally imposed by the Municipal Commissioner, acting as a Magistrate, or it was a seizure without any justification, in which case there would be a cause of action. The Judge of the Small Cause Court is mistaken in supposing that the cause of action arose upon the order of the High Court being made . . . . . .
It is a mistake to suppose, as I observe is often done, that where a proceeding is illegal and may be a cause of action, the cause of action does not arise until the proceeding has been set aside by the Court. There may be cases in which before an action can be brought it is necessary to have the proceedings set aside but where there is an entire want of jurisdiction, where the alleged wrong-doer is not acting judicially and would have no protection from his judicial capacity, it is not necessary to wait until

3. (1873) 19 W.R. 339.

his illegal and unfounded proceedings are set aside. In this case, if the plaintiff had any cause of action, it accrued upon the seizure of the omnibus, and he was bound to bring his suit within three months from the time of the seizure. He could not, under the circumstances, treat the continued detention of the omnibus as fresh causes of action from day to day."

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In *Jagjivan Javherdas* v. *Gulam Jilani Chaudhri*[4] it was held that a suit to recover money wrongfully taken under a decree is governed by Art. 29 of the Limitation Act of 1877 and that the same article applies to cases where compensation for the loss of interest on the money is claimed. This was a case where the property of the defendant was attached.

In *Surajmal* v. *Manekchand*[5] the suit was for damages for wrongful attachment and the question was which article was applicable. The property attached was the property of the plaintiff and not the property of a third person. It does not appear from the facts stated in the judgment that there was any actual seizure of the property. There seems to have been only a prohibitory order. Batty, J., in considering the article applicable observed:

"I do not think the present suit can be described without strain of words as one for specific movable property or for compensation for wrongfully taking or detaining the same. Nor can it be said that the rubies in suit were injured. The injury if any was done to the plaintiff by affecting his power of dealing with them. I therefore think Art. 36 would govern the case, unless there be any other Article which could apply. Article 29 does not appear to do so, for it implies actual seizure under legal process. The only other Article besides 36 that can be cited as appropriate is Art. 42, which relates to suits for compensation for injury caused by an injunction wrongfully obtained. *Nandkumar Shaha* v. *Gaur Shankar*[6] has been cited in this connection; but that case dealt with an injunction under section 92 of Act VIII of 1859 which corresponds with section 492 of the present Code rather than with sections 484, 485, 486 and 268 under which the attachment now in question purports to have been made."

In *Murugesa Mudaliar* v. *Jattaram Davy*[7] certain properties in the hands of a third person were attached on the 12th of June, 1895. The plaintiff filed a claim which was disallowed. Thereupon he filed a regular suit to establish his right which was decreed in his favour. He then filed a suit in 1899 for recovering damages. The defendants, among other pleas, contended that the suit was barred by limitation. The plaintiff contended that the period of limitation should be calculated from the time when his rights were finally declared by the High Court, or at any rate, that the time occupied in the proceedings connected with the Small Cause Court should be deducted under section 14 of the Limitation Act. It was held by Sir

4. (1883) I.L.R. 8 B. 17.
5. (1903) 6 Bom. L.R. 704.
6. (1870) 5 Beng. L.R. Appx. 4.
7. (1900) I.L.R. 23 M. 621.

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Arnold White, C.J. and Subramania Aiyar, J., that the suit was barred and that the plaintiff was not entitled to have the time spent in prosecuting the previous suit deducted from the period of limitation. The learned Judges observed:

"In our judgment the plaintiff's cause of action accrued on the 12th June, 1895. The present suit was instituted on the 26th April, 1899. Unless, therefore, by virtue of the earlier proceedings taken by the plaintiff he can claim the benefit of section 14 of the Limitation Act, the question whether the period of limitation is the one year's period prescribed by Art. 29 or the three years' period prescribed by Art. 49 is immaterial."

After holding that the period under section 14 cannot be excluded, the learned Judges observed:

"But it has been argued on behalf of the plaintiff that a distinction must be drawn between a claim for compensation for wrongful seizure of moveable property where the compensation sought is merely the value of the goods seized, in which case it is argued that Art. 49 applies, and a claim for compensation by way of damages which are consequential on the wrongful seizure and are independent of any question of compensation for the value of the goods, in which case it has been argued the period of limitation is one year under Art. 29. There is no reason in principle for this distinction and, in our judgment, the legislature never intended that any such distinction should be drawn. Art. 29 is quite general in its terms and we think it was intended to apply to all cases where the alleged wrongful seizure was made under legal process. The case of *Manavikraman* v. *Avisilan Koya*[2] may be distinguished on the ground that, in that case, the wrong complained of was the institution of a suit without reasonable grounds followed by an attachment of the goods of the defendant in the suit; whereas in the present case the goods belonged to a person who was not a party to the suit in which the attachment was made."

In *Narasimha Rao* v. *Gangaraju*[8] it was held by Sir Arnold White, C.J. and Pinhey, J., that Art. 29 of the second schedule to the Limitation Act applied to suits for damages for wrongful attachment. This was a case where the goods of a third person were attached. He preferred a claim which was dismissed but he succeeded in a suit under section 283 of the Civil Procedure Code. The attachment was on the 10th of December, 1899. The suit was finally decided in plaintiff's favour on the 7th of February, 1903, and the suit for damages was instituted in 1903. Sir Arnold White, C.J., was of opinion that Art. 29 applied and he followed the decision in *Murugesa Mudaliar* v. *Jattaram Davy*.[7] The learned Chief Justice observed:

"The Lower Courts have dealt with the case on the footing that the attached property was moveable property and I deal with the case on the same footing. I am of opinion that the appropriate article is Art. 29, since this is the only article which refers specifically to wrongful seizure under

2. (1895) I.L.R. 19 M. 80: 6 M.L.J. 11. 7. (1900) I.L.R. 23 M. 621.
8. (1908) I.L.R. 31 M. 431: 18 M.L.J. 590 (F.B.).

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legal process. This was the view taken by this Court in *Murugesa Mudaliar* v. *Jattaram Davy*[7]. I do not think this article should be construed as limited to claims for consequential damages and as not applicable where the plaintiff seeks only to recover the value of property seized, or the sale-proceeds, if the property has been sold. This is obviously not the sense in which the word is used in Arts. 30 and 31, and I do not see why it should be construed in this restricted sense in Art. 29. If Art. 29 applies, the law is express and the time is one year from the date of the seizure. No doubt section 283 of the Code makes provision for a special procedure whereby a claimant to property which has been seized in execution may establish his right, but I fail to see how the provisions of this section can have the effect of postponing the time when limitation begins to run, or suspending the time which has begun to run, when the Limitation Act makes express provision in the matter. Further I can see no ground for holding that time does not run so long as the property remains in *custodia legis*. The damage to the plaintiff is the seizure of his property. True, he may eventually succeed in showing the property is his and in the meantime the property is safe, but he is none the less damaged by being deprived of the enjoyment of his own property."

Sankaran Nair, J., was of opinion that so long as the property remained in the custody of the Court the plaintiff cannot be said to have lost it and is therefore not entitled to any compensation for its loss, and that Art. 29 does not apply. He was of opinion that Art. 62 or Art. 120 applied. With this difference of opinion the matter came before Pinhey, J., who was of opinion that Art. 29 applied to the case. The learned Judge observed:

"If the seizure was not wrongful there was nothing wrongful in the payment. It is conceded that the seizure was wrongful. This is not a continuing wrong. Later manifestations of the original damage done and consequent upon the injury originally sustained do not give rise to a new cause of action. The cause of action therefore was the original seizure and time began to run from that date. The article of Schedule II of the Limitation Act that governs the case would appear to be either Art. 29 or Art. 49."

After referring to the view of the learned Chief Justice that the distinction between Art. 29 and Art. 49 is that the former article applies to a case of wrongful seizure made under legal process, whereas the latter applies when the wrongful seizure is made by a private person, the learned Judge observed:

"There is much to be said in support of this view, but it seems to me unnecessary, now, to decide which of the two articles applies, for the suit is admittedly barred whichever article is applied, if the wrongful seizure is taken as the starting point for limitation, and no allowance is made for the time spent in litigating the title under section 283, Code of Civil Procedure."

This case seems to me to be authority for two propositions:

(1) That the starting point for limitation in case of wrongful seizure of goods under legal process is the wrongful seizure

7. (1900) I.L.R. 23 M. 621 at 624.

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and not when the plaintiff obtains a declaration of his rights as to the property seized; and

(2) That the time spent in the previous litigation cannot be excluded in computing the period of limitation.

Having regard to the reasoning of the learned Chief Justice and Pinhey, J., nothing turns on the fact that the property attached in the present case was the property of a third person and not the property of the plaintiff.

Madras Steam Navigation Co., Ltd. v. *Shalimar Works, Ltd.*[9] was a case where the property of the plaintiff was attached. The suit was for damages. It was held that a suit for damages for wrongful seizure under legal process was governed by Art. 29 of the Limitation Act.

In this case, the plaintiff was a Company carrying on business in Calcutta and certain repairs to a steamer owned by the Company were carried out by the defendants. The defendants filed a suit for the recovery of the money due to them and the ship was attached on the 4th of June, 1910. The suit was dismissed for want of jurisdiction and the ship was released from attachment on the 31st of January, 1912. The suit for damages for the wrongful attachment of the steamer was filed on the 4th of June, 1912. Then the question arose as to whether the suit was barred by limitation. Jenkins, C.J., and Stephen, J., held that the suit was barred. As regards limitation, the learned Chief Justice after holding that the attachment cannot be said to be a nullity owing to want of jurisdiction to try the suit observed:

"It has been further contended that as this was a trespass to goods, Art. 36 should be applied; but Art. 29 is specific and fits the case, and it is a rule of construction of long application that a general article does not govern where there is a particular article which covers the case. Nor do I think can Art. 49 be treated as governing this case rather than Art. 29. It was the seizure, if wrongful, that was the cause of action and the plaintiff cannot treat the suit as one for trespass apart from the seizure for the purpose of evading Art. 29. The conclusion then to which I come is, that this suit as framed is based on malice or its equivalent, that in the absence of proof of malice or its equivalent the suit if treated as one for trespass will not lie in the circumstances of this case; and that if such a suit did lie it would fall under Art. 29 and would be barred."

In *Yellammal* v. *Ayyappa Naick*[10] it was held by a Full Bench of this Court that in order to attract the provisions of Art. 29 there should be actual seizure and that neither attachment of a debt nor voluntary payment of it into Court would

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9. (1914) I.L.R. 42 C. 85.
10. (1914) I.L.R. 38 M. 972: 26 M.L.J. 166 (F.B.).

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constitute seizure of movable property under legal process within the meaning of Art. 29 of the Limitation Act.

In *Pandiri Veeranna* v. *Mandavilli Subba Rao*[11] movables already attached and seized at the instance of *A* were further attached by the issue of a prohibitory order at the instance of the defendant. A suit for damages was filed against the defendant who further attached the properties and it was held that a suit for damages for compensation for such attachment was governed by Art. 29 or 36 of the Limitation Act and not by Arts. 42, 49 or 120. In dealing with the second attachment which was admittedly not by seizure, Sadasiva Aiyar, J., referred to *Yellammal* v. *Ayyappa Naick*[10], and his view seems to be that if there was actual seizure Art. 29 would apply. He was also of opinion that if there was actual seizure there was no continuing wrong.

In *Ram Narain* v. *Umrao Singh*[12] it was held that Art. 29 was the article to be applied to a suit for damages on account of an unlawful attachment before judgment of a shop belonging to the plaintiff, and that the attachment was not a continuing wrong within the meaning of section 23 of the Limitation Act.

I may in this connection refer to *Sarat Kamini Dasi* v. *Nagendra Nath Pal*[13] where the question arose whether Art. 109 could be applied to cases where a mortgage sale which was held on the 6th of May, 1913, was not confirmed till the 28th of January, 1914, owing to an infructuous application to set it aside and a suit was filed on the 16th of September, 1916, by the auction purchaser to recover sums realised by the defendant as rents from the tenants of the land. It was held that under Art. 109 limitation began to run from the date of the receipt of the rents and that the action was barred. In dealing with Art. 109, Mukerji, J., observed:

"A careful study of the third column of the schedule reveals an outstanding fact which cannot be ignored, namely, that the starting point of limitation does not always synchronise with the cause of action; in many cases it does, but in others it dates from some specified events which again are either anterior or posterior to the accrual of the cause of action."

The learned Judge after referring to all the authorities and to the argument as regards suspension or extension of time observed:

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10. (1914) I.L.R. 38 M. 972: 26 M.L.J. 166 (F.B.).
11. (1915) 31 M.L.J. 257.
12. (1907) I.L.R. 29 A. 615.
13. (1925) 29 C.W.N. 973.

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"In applying the principle of limitation, the Indian Courts are not permitted to travel beyond the articles and the exceptions and provisos embodied in the Act itself; and that apart from the provisions of the Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions."

The argument that there is a difference between cases where the property attached belongs to the defendant and cases where the property attached belongs to a third party is based upon the decisions in *Manavikraman* v. *Avisilan Koya*,[2] *Arjun* v. *Abdul*[14], *Manga* v. *Changa Mal*[15] and *Sokkalingam Chetti* v. *Krishnaswami Aiyar*[16].

I can find no principle on which a difference should be made whether the attachment was of the defendant's property or the property of a third person. And Mr. Sambasiva Rao for the respondents is unable to point to any ground on which such a distinction can be based.

In *Manavikraman* v. *Avisilan Koya*[2] the suit was in respect of timber attached before judgment in November, 1888. The suit was dismissed in October, 1889 and an appeal by the plaintiff was dismissed in July, 1890. The defendant in that suit filed a suit in September, 1892, against the plaintiff who obtained the attachment for damages occasioned by the attachment before judgment. The case was one where the property was claimed by two persons and for the purpose of preserving the property, the property was attached by the Court. But that makes no difference in principle. The learned Judges thought that Art. 36 applied and that the suit was barred by limitation. In dealing with the contention that Art. 29 would apply, the learned Judges observed:

"We agree with them (the Courts below) that Art. 29 does not apply since this is not a case of wrongful seizure, but it is argued for the appellant that the case falls under Art. 36 and that the suit should be regarded as one for misfeasance independent of contract, and that it falls under the description of a tort for which a limitation of two years is generally provided. *See* the judgment of Farran, J., in *Essoo Bhayaji* v. *The Steamship 'Savitri'*.[17]"

After discussing the scope of Art. 49 the learned Judges thought that Art. 36 should be applied.

In *Sokkalingam Chetti* v. *Krishnaswami Aiyar*[16] the learned Judges draw a distinction between cases where the property of a third person is attached and cases where the property

2. (1895) I.L.R. 19 M. 80: 6 M.L.J. 11.
14. (1921) 35 C.L.J. 480.
15. (1924) 22 All. L.J. 977.
16. (1919) 38 M.L.J. 324.
17. (1886) I.L.R. 11 B. 133.

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of the defendant is attached, and were of opinion that Art. 29 of the Limitation Act was restricted to cases in which the seizure is intrinsically wrongful but did not apply to cases where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process but by misrepresentation to the Court. They think that Art. 36 would apply in cases where the property attached belongs to the defendant and distinguish *Murugesa Mudaliar* v. *Jattaram Davy*,[7] *Multan Chand Kanyalal* v. *Bank of Madras*,[18] *Narasimha Rao* v. *Gangaraju*,[8] *Pandiri Veeranna* v. *Mandavilli Subba Rao*[11] and *Ram Narain* v. *Umrao Singh*[12] on that ground. As regards the decision in *Madras Steam Navigation Co., Ltd.* v. *Shalimar Works, Ltd.*[9] they think that the observations are *obiter*. With all respect, the case in *Madras Steam Navigation Co., Ltd.* v. *Shalimar Works, Ltd.*[9], which is a high authority of Sir Lawrence Jenkins, C.J., discusses all aspects of the matter.

In *Arjun* v. *Abdul*[14] the learned Judges held that a seizure cannot be said to be wrongful except where the writ was without jurisdiction or where the writ was executed against a person who was no party to the decree and where the goods were outside the scope of the suit. The learned Judges observed:

"In the present case the writ was issued by the Court and *prima facie* it was not a wrongful seizure. The writ was not without jurisdiction as the Court had jurisdiction over the subject-matter, nor was the writ executed against a person who was no party to the decree, nor with respect to goods outside the scope of the writ. In these circumstances, we think that Art. 29 is inapplicable to the case. This view is supported by the cases of *Manavikraman* v. *Avisilan Koya*[2] and *Sokkalingam Chetty* v. *Krishnaswami Aiyar*[16]."

Then they distinguish the other cases on the ground that the writ was issued against a stranger. As regards the *Madras Steam Navigation Co., Ltd.* v. *Shalimar Works, Ltd.*[9] they think that the observations are *obiter*. This decision, with all respect, gives no reason why there should be this distinction drawn; it simply purports to follow *Manavikraman* v. *Avisilan Koya*[2] and *Sokkalingam Chetty* v. *Krishnaswami Aiyar*[16].

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2. (1895) I.L.R. 19 M. 80: 6 M.L.J. 11.
7. (1900) I.L.R. 23 M. 621.
8. (1908) I.L.R. 31 M. 431: 18 M.L.J. 590 (F.B.).
9. (1914) I.L.R. 42 C. 85.
11. (1915) 31 M.L.J. 257.
12. (1907) I.L.R. 29 A. 615.
14. (1921) 35 C.L.J. 480.
16. (1919) 38 M.L.J. 324.
18. (1903) I.L.R. 27 M. 346.

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In *Manga v. Changa Mal*[15] it was held that Art. 29 applied to a suit for compensation for wrongful seizure of movable property and that there could be no wrongful seizure because the attachment was made under legal process. The learned Judges thought that Art. 29 would apply only in cases where the seizure was without jurisdiction.

As observed in *Hughes v. The Chairman of the Municipal Commissioners of Howrah*[3] and the other cases I have referred to, a seizure by the plaintiff on insufficient grounds is wrongful *ab initio* and cannot be said to become wrongful only when the Court adjudicates on the matter. The balance of authority is in favour of the view that Art. 29 would apply both to cases of seizure under orders passed by a Court without jurisdiction and to cases of seizure under orders passed by a Court having jurisdiction but on insufficient grounds. In fact in all the Madras cases referred to where it was held that Art. 29 applied the seizure was by a Court having jurisdiction but on insufficient grounds. And even in *Sokkalingam Chetty v. Krishnaswami Aiyar*[16] this distinction was negatived.

I am of opinion that Art. 29 applies to all cases of attachment before judgment where specific property is seized and the seizure is wrongful either because the Court had no jurisdiction or because the attachment was obtained on insufficient grounds, that it makes no difference whether the property attached belongs to the defendant or to a third party and that we are not at liberty having regard to the plain provisions of the article to read into the third column anything that would make the starting point a different one.

In this view it is unnecessary to consider the question as to whether the Court was right in awarding any damages in this case.

I would allow the appeal and dismiss the plaintiffs' suit with costs throughout.

Reilly, J.

Reilly, J.—On 30th March, 1920, the defendants obtained from the Subordinate Judge of Dharwar a conditional order against the plaintiffs under R. 5 of O. 38, Code of Civil Procedure, for attachment of moveables before judgment. The attachment was made on 9th, 10th and 11th April, 1920. On

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3. (1873) 19 W.R. 339.

15. (1924) 22 A.L.J. 977.

16. (1919) 38 M.L.J. 324.

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21st April, 1920, after hearing the plaintiffs, the Subordinate Judge confirmed the attachment. The plaintiffs appealed to the High Court of Bombay, which ordered attachment to be raised as having been obtained by the defendants on insufficient grounds. That order was made on 16th September, 1921. On 26th October, 1921, the plaintiffs instituted this suit for damages on account of the attachment. The question before us is whether the suit is time-barred, having been brought more than a year after the attachment was effected.

The defendants, who are the appellants here, contend before us that the suit is covered by Art. 29 of Schedule I of the Limitation Act, which runs "for compensation for wrongful seizure of movable property under legal process". Taking those words in their plain meaning, they certainly cover the case. But it is contended for the plaintiffs that "wrongful" in this article has something narrower than its ordinary meaning —that it refers only to seizures wrongful because made under the order of a Court without jurisdiction in the matter or in respect of the property of a person who is not a party to the proceedings or in excess of the order of the Court. On the face of it that is an arbitrary restriction of the meaning of "wrongful" in the article. It cannot be denied that, if an attachment before judgment is obtained by misrepresentation or on insufficient grounds, it is wrongful in the ordinary sense of the word. If it were not wrongful, no suit for damages in respect of it would lie, and that is not contended.

But it is argued that a restricted and artificial sense has been placed on the word "wrongful" in Art. 29 by judicial interpretation. The cases cited before us to show that are *Manavikraman* v. *Avisilan Koya*[2], *Sokkalingam Chetti* v. *Krishnaswami Aiyar*,[16] *Arjun* v. *Abdul*[14] and *Manga* v. *Changa Mal*.[15] The last three of these cases rest on the first. The second rests on the first, the third on the first and second, and the fourth on the first and second and third. But unfortunately there appears to have been some misapprehension about the first case. When we examine that case, we find it was not concerned, as was apparently thought by the learned Judges who referred to it in the later cases, with an attachment of a defendant's property obtained by a plaintiff before judgment under R. 5 or R. 6 of O. 38, Code of Civil Procedure, or the corresponding provisions

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2. (1895) I.L.R. 19 M. 80: 6 M.L.J. 11.
14. (1921) 35 C.L.J. 480. 15. (1924) 22 A.L.J. 977.
16. (1919) 38 M.L.J. 324.

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of the previous Code. In that case a *janmi* in Malabar, the Nilambur Tirumalpad, had sued another *janmi*, the Manjeri Karanamulpad, and a Mappilla to recover possession of a hill; the Mappilla, claiming to have obtained a lease of the hill from the Karanamulpad, had cut some trees on it; the Tirumulpad, who claimed the trees as his own, obtained an order for the attachment of the logs pending the suit. That attachment was obviously not an attachment of the defendant's property to prevent him from disposing of it or removing it in order to obstruct or delay the plaintiff's remedy in execution if he should get a decree—that is an attachment such as is now made under O. 38, R. 5 or R. 6—but an attachment of part of the property in dispute between the parties for its preservation, such as is now made under O. 39, R. 7. As the learned Judges point out in the opening of their judgment, the Tirumalpad had got the timber attached on the allegation that it was his. He failed in his suit and appeal. Then in the subsequent suit, which came before the High Court in *Manavikraman* v. *Avisilan Koya*[2], the Mappilla sued him for damages on account of the attachment of the timber, which had been found to be the property of the Mappilla. The learned Judges eventually found on second appeal that the Mappilla's suit for damages was time-barred; but incidentally they remarked that the attachment was not a case of "wrongful seizure" within the meaning of Art. 29. It is not necessary to discuss now whether that view was correct. But obviously that case, when examined, is no authority for the proposition that an entirely different kind of attachment, an attachment of a defendant's own admitted property, obtained before judgment by misrepresentation or on insufficient grounds, is not a wrongful seizure within the meaning of Art. 29. The three subsequent cases, which I have mentioned and in which it has been assumed that *Manavikraman* v. *Avisilan Koya*[2] dealt with the latter kind of attachment, have been built, if I may say so with respect, on a foundation which was not there.

On the other hand there are a number of cases which interpret Art. 29 according to the plain meaning of the words, e.g., *Murugesa Mudaliar* v. *Jattaram Davy*,[7] *Narasimha Rao* v. *Gangaraju*,[8] *Jagjivan Javherdas* v. *Gulam Jilani Chaudhri*,[4] *Ram Narain* v. *Umrao Singh*[12] and *Madras Steam Navigation Co., Ltd.* v. *Shalimar Works, Ltd.*[9] *Jagjivan Javherdas* v. *Gulam*

2. (1895) I.L.R. 19 M. 80: 6 M.L.J. 11.
4. (1883) I.L.R. 8 B. 17.
7. (1900) I.L.R. 23 M. 621.
8. (1908) I.L.R. 31 M. 431: 18 M.L.J. 590 (F.B.).
9. (1914) I.L.R. 42 C. 85.
12. (1907) I.L.R. 29 A. 615.

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Jilani Chaudhri[4] was a case of money wrongly taken in execution. In *Murugesa Mudaliar* v. *Jattaram Davy*[7] the property of a third party was attached in execution. In *Narasimha Rao* v. *Gangaraju*[8] and *Ram Narain* v. *Umrao Singh*[12] the attachment was before judgment; but it was the property, not of the defendant, but of a third party which was attached. But, whether the attachment complained of is made before judgment or in execution, whether the property attached is that of a defendant or of a third party, if it is wrongful, in my opinion we cannot exclude it from the scope of Art. 29 unless compelled to do so by clear authority. In *Murugesa Mudaliar* v. *Jattaram Davy*[7] it was remarked *obiter*:

"Article 29 is quite general in its terms, and we think it was intended to apply to all cases where the alleged wrongful seizure was made under legal process."

In *Narasimha Rao* v. *Gangaraju*[8], where a third party sued to recover the proceeds of his property, which had been wrongfully attached before judgment and sold, though they disagreed on other points, White, C.J., and Sankaran Nair, J., agreed that a suit for damages for wrongful attachment would come within Art. 29. In my opinion we are not compelled by authority to put any artificial or strained meaning on the words of Art. 29 and that article covers the present suit.

But it is contended for the plaintiffs that, even if that article covers the case, the suit was in time because the "date of seizure" mentioned in that article as the time from which the period begins to run does not mean in a case like this the date of the actual seizure but the date when the seizure was declared wrongful by a competent Court. In this case that would be the date of the decision of the High Court of Bombay on appeal, *viz.*, 16th September, 1921. But that construction obviously does great violence to the language used in the article. Why should the legislature have said one thing and have meant another, which could have been so easily expressed? If we compare Art. 29 with Art. 19 or Art. 23, it becomes still more difficult to believe that, when the explicit words "the date of the seizure" were used in Art. 29, they can have been intended to mean anything but the date of the actual seizure. The reason for trying to read another meaning into the words of the article is that in some cases, as in this case, there may be hardship because the plaintiff does not get a decision in his favour

4. (1883) I.L.R. 8 B. 17.
7. (1900) I.L.R. 23 M. 621.
8. (1908) I.L.R. 31 M. 431: 18 M.L.J. 590 (F.B.).
12. (1907) I.L.R. 29 A. 615.

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that the seizure was wrongful until after a year from the date of the seizure has expired. Such cases are unfortunate; but I do not see how they could justify us in departing from the plain meaning of the words in the article. There was similar hardship in *Murugesa Mudaliar* v. *Jattaram Davy*,[7] apart from the time spent in seeking a wrong remedy, and in *Pandiri Veeranna* v. *Mandavilli Subba Rao*[11] in respect of the attachment at the instance of the 1st defendant in that case; but the learned Judges did not hesitate to apply the article literally on that account. In *Narasimha Rao* v. *Gangaraju*[8] all the learned Judges agreed that under Art. 29 time ran from the date of the actual seizure. In my opinion nothing but overwhelming authority or the clearest demonstration that the legislature could not have meant what it said would justify us in reading into the words "the date of the seizure" in Art. 29 the additional words suggested for the plaintiffs. No such justification has been shown. If the period fixed in the article is inconveniently short, that is a matter for the legislature, not for us, to put right.

I agree that the plaintiffs' suit was time-barred under Art. 29 and that, therefore, this appeal should be allowed and the plaintiffs' suit dismissed with costs in both Courts.

S.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Arumuga Thevan and others .. *Appellants**

(*Prisoners—Accused Nos.* 1 *and* 3 *to* 7).

Arumuga Thevan, *In re.*

Evidence Act (*I of* 1872), *S.* 32—*Statement of deceased person as to cause of his death—Evidentiary value—Need for corroboration.*

When a man who is dead has left a statement throwing light upon the cause of his death, that statement is relevant evidence under S. 32 of the Indian Evidence Act, but it is not entitled to any peculiar credit. No doubt if a man gasps out his story soon after the occurrence it may be said that there was no time for him to fabricate or for his friends to suggest falsehood. But if the man is in bed in hospital four days after the event and a month before he dies and makes a statement, that statement carries no more weight than if he made it in the witness box, and rather less, because he has never been cross-examined. Under those circumstances, it is incumbent on the Court before it accepts the statement as true to see how far it is corroborated.

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*Cr. Appeal No. 365 of 1929. 11th November, 1929.

7. (1900) I.L.R. 23 M. 621.

8. (1908) I.L.R. 31 M. 431: 18 M.L.J. 590 (F.B.).

11. (1915) 31 M.L.J. 257.

Arumuga Thevan, *In re.*

Appeal against the order of the Court of Session of the Madura Division in Case No. 31 of the Calendar for 1929.

V. Rathnam for appellants.

The Public Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The six appellants have been convicted on the charge that they rioted with the common object of hurting one Rani Sundararajan and also Mookan Servai and Kalimuthu Servai. The 1st and 4th appellants have also been convicted under section 148, and the first under section 326, and all the others under sections 326 and 149.

The learned Judge finds that the statement taken from Rani Sundararajan before he died, Ex. F, is a substantially true account of what occurred.

He says that he came to Madura from Tirupparankundram and found Mookan and Kalimuthu sitting in front of the house of Nagayan, who joined them, and told them that his son's wife had left him, and when his son went to get her back from her parents they called in accused 1, who protested against the son trying to get his wife from a house of which accused 1 was the landlord. The son said there was no need to ask his leave, and was beaten, Nagayan protested and was also beaten. Next morning he was beaten again and went home.

Nagayan was telling this story to the others at about 3-30 P.M., when accused 1 and 4 to 7 came and asked why they were sitting there. Mookan and Sundararajan tried to preserve peace, but accused 1 and Sundararajan began to abuse each other, whereupon accused 5 beat him on the head, and accused 1 stabbed him with a spear, and accused 4 cut him with a chopper. Kalimuthu and Mookan picked up sticks to rescue him, and they turned upon them.

From this account it would seem that the common object was to drive Nagayan out of the town because he supported his son in trying to get back his wife. It is not at all clear why accused 1 should be so violently interested in the quarrel merely because the girl's parents were his tenants; but in any case neither he nor the other accused seem to have any object to beat Sundararajan, Kalimuthu or Mookan until they quarrelled that afternoon. The learned Judge has never addressed his mind to this difficulty. In his 15th paragraph he reiterates his

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belief in Ex. F, and in his 17th he finds the accused guilty of rioting, but he nowhere explains what riot he deduces from the evidence of Ex. F. It is certainly not the riot set forth in the charge, for if the accused were after Nagayan and suddenly came upon Sundararajan, Mookan and Kalimuthu it cannot be said that their common object was ever to hurt these three.

When a man who is dead has left a statement throwing light upon the cause of his death that statement is relevant evidence under section 32 of the Indian Evidence Act, but it is not entitled to any peculiar credit. No doubt if a man gasps out his story soon after the occurrence it may be said that there was no time for him to fabricate or for his friends to suggest falsehood.

"The tongues of dying man enforce attention like deep harmony; where words are scarce, they are seldom spent in vain; for they breathe truth that breathe their words in pain."

But if, as in this case, the man is in bed in hospital four days after the event, and a month before he dies and makes a statement, that statement carries no more weight than if he made it in the witness box, and rather less because he has never been cross-examined.

It is, therefore, incumbent upon the Court before it accepts the statement as true to see how far it is corroborated. Mookan so far from corroborating it says it was made by Sundararajan when he was off his head owing to fever. He says that he was sitting in front of his own house that afternoon, and heard an uproar coming from inside the house of Nagayan. He stepped into the road, saw all the accused there and asked them why they had come after beating Nagayan and his son in the morning. Then accused 1 gave him seven slaps, and the others beat him. Kalimuthu ran to his rescue and he too was beaten. Then Sundararajan came up and he was stabbed.

Nagayan says that he was standing outside a shop when the accused attacked him, and he ran inside the house and bolted the door. He looked out later and saw Sundararajan on the ground. He had not seen him before that day. Kalimuthu says that he ran up and saw Mookan being beaten, he tried to rescue him, got beaten himself, and then Sundararajan came and protested and was stabbed.

The learned Judge rather understates the divergency between the story in Ex. F and the story in the depositions, when he says that they differ to some extent. They are quite different. Probably it is a correct inference that Sundararajan and

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Mookan when they lay in hospital never arranged to tell the same story; but that hardly proves that one story out of the two discrepant stories must be true. It merely proves that one of them at least is lying and they never troubled to conceal the fact, and if it is an understatement to say that there is some difference it is an overstatement as it is said in para. 15 that the evidence of Mookan and Kalimuthu largely corroborates Ex. F. The truth is that Ex. F is not corroborated at all, and since it is contradicted by the oral evidence, no conviction can be founded upon it. Nor can the judgment be supported by relying upon the oral evidence, because the trial Court has not believed it to be true. It finds that P.Ws. 8 and 9 changed the facts in order to safeguard themselves, and the other alleged eye-witnesses carry little weight.

Some attempt seems to have been made to convict the accused out of their own mouths. The interrogatories came perilously near to cross-examination and accused 5 was made to admit a complaint of his to the Magistrate which was marked as a prosecution Ex. (L) and used against him as showing that he had never attempted to explain how the prosecution witnesses came by their injuries. The learned Public Prosecutor very properly abstained from any reference to this Exhibit.

To sum up, even the Lower Court finds that there is no evidence for the common object stated in the charge. The only evidence of the common object upon which the conviction for rioting is founded is Ex. F, and that statement is both uncorroborated and contradicted. Therefore the findings under sections 148, 149 cannot possibly stand.

As for that under section 326 no doubt the witnesses agree that accused 1 stabbed Sundararajan, but their stories are too discrepant and improbable. An outstanding difficulty which has never been cleared up is how accused 1 took a prominent part in the quarrel merely because one side happened to have rented his house.

The findings and sentences are cancelled, and appellants are acquitted.

B.V.V. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—VISCOUNT DUNEDIN, SIR JOHN WALLIS, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Raja Bahadur Raja Bishnath Saran Singh .. *Appellant**

v.

Thakur Chandrapal Singh and another .. *Respondents.*

P. C.

Raja Bishnath Saran Singh *v.* Thakur Chandrapal Singh.

Landlord and Tenant—Status of sub-proprietor—Proof—Mode of enjoyment of property—Payment of revenue by holder to Government.

The plaintiffs and their ancestors were proved to have managed their lands and exercised *Zemindary* rights in them, from a period prior to the annexation of Oudh, in a manner incompatible with the position of *thekadars.* It further appeared from a *putta* entered into by the old proprietor that the holders were to pay revenue direct to the Government.

Held that, under the circumstances, the conclusion was inevitable that the plaintiffs were sub-proprietors and not tenants.

Decision of the Chief Court of Oudh affirmed.

Appeal No. 58 of 1928 from a judgment and decree, dated the 13th December, 1926, of the Chief Court of Oudh, which affirmed a judgment and decree, dated the 1st May, 1925, of the Subordinate Judge of Rae Bareli.

Dunne, K.C. and *Parikh* for appellant.

De Gruyther, K.C. and *Dube* for respondents.

26th June, 1930. Their Lordships' judgment was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—The sole question in this case is whether the respondents are sub-proprietors or tenants. Their Lordships have before them the copy of the *putta* entered into by the old proprietor, and the wording of that *putta* certainly does more than suggest that they are to be under-proprietors and not tenants. They are not to pay revenue direct to the Rajah but direct to the Government. Then we have the finding of the Court below, which is well summarised in this sentence of the Chief Court judgment:

"There is a mass of evidence, which the learned trial Judge has rightly believed, to the effect that the plaintiff-respondents and their predecessors-in-interest have exercised rights in the manner in which under-proprietors would exercise rights and not in the manner in which tenants would exercise rights. This evidence proves that they have managed the cultivated and uncultivated lands, exercised the rights of escheat, allowed tenants to settle in the village, to plant trees, to sink wells, that they exercised *zemindary* rights in a manner incompatible with the position assigned

*P.C. Appeal No. 58 of 1928. 26th June, 1930.
Oudh Appeal No. 12 of 1927.

to them by the defendant-appellant, that they are *Thekadars* who could be removed on notice. They have proved from this evidence that they exercised these rights as far back as the memory of living man can go, and it is a reasonable finding that they have exercised these rights from a period prior to the annexation. I therefore find that this grant in addition to being a genuine grant is an effective grant."

If to that be added what would be at any rate the *prima facie* construction of the *putta* the result seems to be inevitable, and their Lordships will therefore humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellant: *Watkins and Hunter.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

Somisetti Seshayya Chetty and others .. *Appellants**
(*Respondents in S.A. No. 966 of 1925 on the file of the High Court*)

v.

Rolla Subbadu, minor by next friend Rolla Ragadu and others .. *Respondents*
(*Appellants in do.*).

Limitation Act (IX of 1908), *Ss.* 19 *and* 31—"*Prescribed*"—*Meaning of—Suit on hypothecation barred—Subsequent acknowledgment within the special period prescribed by S.* 31—*Effect.*

S. 31 does prescribe a period of limitation for a special class of cases. It applies to cases where the mortgagee's right to sue had become time-barred before the Act was passed as well as to suits not already time-barred but on the point of being so.

An acknowledgment of liability though made after the expiry of the period of limitation for the original cause of action but within the special period of limitation prescribed under S. 31 gives a fresh period from the date of acknowledgment.

The word "prescribed" in S. 19 of the Limitation Act does not exclusively refer to the schedule. It means prescribed by any section or article of the schedule.

Hira Singh v. *Mt. Amarti,* (1912) I.L.R. 34 A. 375; *Sheo Partab Singh* v. *Tajammul Hussain,* (1926) I.L.R. 49 All. 67; *Murugesa Mudali* v. *Ramaswami Chettiar,* (1913) 26 M.L.J. 23 and *Debendranath Roy* v. *Kartic Prasad Das,* (1928) I.L.R. 55 Cal. 1210, followed.

Shevdas Daulatram v. *Narayan,* (1911) I.L.R. 36 Bom. 268 and *Bai Hemkore* v. *Masamalli,* (1902) I.L.R. 26 Bom. 782, distinguished.

Subbarayan v. *Natarajan,* (1922) I.L.R. 45 M. 785: 43 M.L.J. 168; *Ummathu* v. *Pathumma,* (1921) I.L.R. 44 M. 817: 41 M.L.J.

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*L.P.A. No. 99 of 1929. 15th August, 1930.

Somisetti Seshayya Chetty *v.* Rolla Subbadu.

84; *Mari Narasayya* v. *Peruri Krishnamurthi,* A.I.R. 1928 Mad. 1255: 1928 M.W.N. 796, referred to.

In dealing with questions of limitation, the Courts should, as far as possible, place upon the Limitation Act a construction favourable to plaintiffs.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Madhavan Nair, dated 26th April, 1929, in Second Appeal No. 966 of 1925, preferred to the High Court against the decree of the District Court of Nellore in Appeal Suit No. 227 of 1924 (O.S. No. 4 of 1923 on the file of the Court of the Subordinate Judge of Nellore).

S. Varadachariar and *S. V. Venugopalachariar* for appellants.

P. Chenchiah for respondents.

The Court delivered the following

JUDGMENT.—The defendants in this suit are appellants here. This was a suit based upon a hypothecation bond, dated the 31st March, 1897, executed by the father of defendants 1 and 2 and his coparceners. Admittedly Art. 132 of the Limitation Act is the appropriate article in such cases and that provides for a twelve years' period of limitation. The suit in this case was filed on the 2nd February, 1921 and the 12 years' period of limitation provided by Art. 132 of the Limitation Act expired on the 31st March, 1909, but in order to get over the bar of limitation raised against the plaintiffs by Art. 132, an acknowledgment of liability, dated the 6th May, 1909, is relied on by the plaintiffs. It must be noted that this acknowledgment was after the period of limitation provided by Art. 132 had expired, but the plaintiffs' case is that by virtue of section 31 of the Limitation Act, 1908, which came into force together with section 1 on the 7th August, 1908, the period of limitation was in this case extended by two years from the date of that Act. The appellants' case is that section 31 does not prescribe a period of limitation and that therefore in the case of suits already time-barred when the Act came into force, no acknowledgment made within the two years provided by section 31 can be availed of by the plaintiffs in such suits. If the plaintiffs' contention is correct, the present suit was filed within time because they would have, under section 19 of the Limitation Act, a fresh period of limitation of twelve years from the date of the acknowledgment.

We have to consider the effect of sections 19 and 31 of the Limitation Act, and in doing so it must be stated that it is

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beyond question that section 31 was enacted on account of a conflict of opinion between the Allahabad High Court and other Courts with regard to what was the period of limitation in suits on simple mortgages. The Allahabad High Court as well as some other High Courts had taken the view that the article applicable was Art. 147 which gave a period of sixty years' limitation and certain other High Courts thought that the period of limitation was only twelve years under Art. 132. All doubts on the matter were finally set at rest by the decision of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai*,[1] which decided that the period of limitation was 12 years under Art. 132. The result of this decision was that mortgagees in the United Provinces, through a wrong interpretation of the law which had prevailed there, had lost the right of suit and it was in order to prevent this hardship that section 31 was enacted. That section allows mortgagees to bring suits on their mortgages within two years from the date of the passing of the Act or within sixty years from the date when the money became due whichever period expires first. That section applies to cases where the mortgagee's right to sue had become time-barred before the Act was passed. It may also have been intended to apply to suits not already time-barred, but on the point of being so. That section also applies to suits time-barred and dismissed on that account and also to pending suits. It will be seen, therefore, that section 31 was designed to embrace only a special class of cases.

Mr. Varadachari for the defendants-appellants contends that section 31 is purely remedial and gives a period of two years from the passing of the Act for the institution of the special class of suits more as a concession or an act of grace and that section 31 does not prescribe any period of limitation. There is certainly much force in this contention very ably presented to us by Mr. Varadachari. In support of it he has referred to sections 3 and 4 of the Limitation Act. The former says that every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed. That section is perfectly clear and does not give rise to any confusion whatever. Section 4 provides that where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

1. (1907) L.R. 34 I.A. 186: I.L.R. 30 M. 426: 17 M.L.J. 444 (P.C.).

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His contention is that section 4 does not extend the period of limitation at all, that expires on the last day of the period set out in the schedule, but gives the mortgagee a day or days of grace in which to institute the suit. He contends that section 19 which is the acknowledgment section saving limitation, limits the acknowledgment to the period set out in the schedule. The opening words of the section are:

"Where, before the expiration of the period prescribed for a suit . . . . . . an acknowledgment of liability in respect of such property or right has been made . . . . . . ".

He contends that "the period prescribed for a suit" means the period prescribed in the schedule. Mr. Chenchiah on the other hand for the respondents in his very able argument contends that the words "the period prescribed for a suit" mean not only the period of limitation given in the schedule but such further days as are given to persons by other sections of the Act and that the words in section 19 do not mean "prescribed in the schedule" but in their relation to section 31 mean the further period of two years provided for in section 31. He points out that in section 3 the words used are "every suit instituted after the period of limitation prescribed therefor by the first schedule," that there is a definite reference to the schedule and that in section 4 the words are, "the period of limitation prescribed for any suit," the words "in the schedule" being omitted. Our attention was also drawn to section 5 where the words are "the period of limitation prescribed therefor" and other sections and pointed reference was made by him to section 19 where the words are "period prescribed for a suit".

This question has been considered by the High Courts of Bombay, Allahabad, Madras and Calcutta. The Allahabad High Court has consistently held the view that section 31 does prescribe the period of limitation and I think that the respondents' contention that the Madras High Court has taken the same view as that held in Allahabad is correct. The Calcutta High Court also, in the one case to which we were referred in that High Court, shared the Allahabad opinion. The Bombay High Court on the other hand has taken a different view.

In *Shevdas Daulatram* v. *Narayan*[2] the question arose as to whether a suit for which provision is made under section 31 (1) of the Limitation Act, 1908, if instituted on a Monday, one day after the period of two years from the date of the passing of the Act has expired, could be taken to have been instituted within the period of two years and it was held that

2. (1911) I.L.R. 36 Bom. 268.

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section 31 of the Limitation Act did not prescribe a period of limitation and that the suit could not be taken to have been instituted within the period of two years. That Court had not to consider section 19 of the Limitation Act and is on that ground certainly distinguishable from the present case. An earlier case in the Bombay High Court under the old Act, *Bai Hemkore v. Masamalli*[3], was a case of an acknowledgment by the defendant. That was a case of a suit to recover money due under a bond. The defendant made an acknowledgment of liability during the time that the Courts were closed for the vacation. When the acknowledgment was made the three years' period of limitation provided in the Act had expired although the plaintiffs' right to institute the suit on the date was subsisting under section 5 of the old Act which is the same as section 4 of the present Act. In *Sheo Partab Singh* v. *Tajammul Hussain*,[4] a case like the one now under appeal, of acknowledgment of liability, it was held that section 4 does not prescribe any special period of limitation for any kind of suit but only lays down that when the prescribed period of limitation expires on a day when the Court is closed then the suit must be instituted on the day when the Court re-opens and whilst in full agreement with the view taken by the Bombay High Court in *Bai Hemkore* v. *Masamalli*,[3] last referred to, they held that that case was distinguishable from the case then before them. On page 70, Mears, C.J., and King, J., state as follows:—

"It has been argued for the respondents that in section 19 the words 'before the expiration of the period prescribed' must be taken as meaning before the expiration of the period prescribed in the schedule. We see no reason for limiting the meaning of the words in the manner suggested. A period for a suit can be prescribed by a section of the Act as well as by an article of the schedule, and in the present case the period of limitation is specially prescribed in section 31 of the Act."

A contrary view to that contended for here by the appellants was also taken by the Allahabad High Court in *Hira Singh* v. *Musammat Amarti*[5]. There the special period of limitation of two years prescribed by section 31 of the Act of 1908 expired on a Sunday and it was held that a suit for sale to which section 31 applied instituted upon the following Monday was within time. In the opinion of the Bench the time fixed for the institution of suits under section 31 was as much prescribed as if suits instituted under that section found place in the schedule. Another Allahabad case is *Harish Chandra* v. *Kastola Kunwar*[6] where it was held that the word "prescribed" in

3. (1902) I.L.R. 26 Bom. 782.
4. (1926) I.L.R. 49 All. 67.
5. (1912) I.L.R. 34 All. 375.
6. (1924) 80 I.C. 743.

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section 19 of the Limitation Act means "prescribed by any law for the time being in force" and not limited to the period prescribed in the first schedule of the Act. Again in *Abdul Ghani* v. *Chiranji Lal*[7], a decision of a single Judge, it was held that an acknowledgment of a debt made after the expiration of the three years' period prescribed by Schedule I of the Limitation Act, 1908, for a suit upon a promissory note but made before a suit on the note is actually barred by limitation is a good acknowledgment and there was no reason to limit the sense of the expression "period prescribed" to the period prescribed in the schedule alone. I now turn to the decision of Rankin, C.J., in *Debendra Nath Roy* v. *Kartic Prasad Das*[8]. In that case there had been a payment of interest on a simple money bond after the expiration of the three years from the date limited for payment when the Court was closed, but it was held that it could not save limitation under section 20 of the Act if a suit on the bond was not brought on the day the Court re-opened after the vacation. In his judgment Rankin, C.J., dealt with the case in *Bai Hemkore* v. *Masamalli*[3] and he found himself in agreement with what was there laid down. The case in *Sheo Partab Singh* v. *Tajammul Hussain*[4], which is exactly in point here and which distinguished *Bai Hemkore* v. *Masamalli*[3] was also dealt with by him. He states at page 1214 as follows:—

"That section was really intended for a limited class of people to amend the schedule to the Limitation Act and substitute for them a longer period than the period which the schedule really mentions."

This case clearly supports the view of the Allahabad High Court. The view expressed by the Bombay High Court in *Shevdas Daulatram* v. *Narayan*[2] was dissented from in Madras in *Murugesa Mudali* v. *Ramaswami Chettiar*[9], where it was held that the benefit of section 4 of the Limitation Act could be invoked in computing the period prescribed by section 31 of the Limitation Act. The reasoning in the judgment in *Hira Singh* v. *Musammat Amarti*[5] was adopted but that in *Shevdas Daulatram* v. *Narayan*[2] was not followed. In *Subbarayan* v. *Natarajan*[10], a decision of Spencer and Ramesam, JJ., on section 48, Civil Procedure Code, in the opinion of Spencer, J., the word "prescribed" used in section 15 of the Limitation Act means

2. (1911) I.L.R. 36 Bom. 268.
3. (1902) I.L.R. 26 Bom. 782.
4. (1926) I.L.R. 49 A. 67.
5. (1912) I.L.R. 34 A. 375.
7. (1927) I.L.R. 49 All. 726.
8. (1928) I.L.R. 55 Cal. 1210.
9. (1913) 26 M.L.J. 23.
10. (1922) I.L.R. 45 M. 785: 43 M.L.J. 168.

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"prescribed by the first schedule to the Act" though the words "in the schedule" do not appear in the section as in sections 3 and 6 of the Act. In *Ummathu* v. *Pathumma*[11], a case not really in point, Ramesam, J., appears to think that *Bai Hemkore* v. *Masamalli*[3] was correctly decided but here again that case is distinguishable from this for the reasons already given. In *Mari Narasayya* v. *Peruri Krishnamurthi*[12] reference is made to *Murugesa Mudaliar* v. *Ramaswami Chettiar*[9], where *Shevdas Daulatram* v. *Narayan*[2] was dissented from but Reilly, J., had not to consider section 31 at all but the effect of section 4 of the Act and he held that the period of limitation mentioned there must be understood not only as prescribed in the schedule but also as qualified by sections 5 and 22.

In our opinion, the correct view of the effect of S. 31 has been taken by the Allahabad High Court in *Hira Singh* v. *Musammat Amarti*[5] and *Sheo Partab Singh* v. *Tajammul Hussain*[4] by this Court in *Murugesa Mudali* v. *Ramaswami Chettiar*[9] and by the Calcutta High Court and therefore section 31 of the Limitation Act does prescribe a period of limitation. Courts in dealing with questions of limitation should, as far as possible, place upon the Limitation Act a construction favourable to plaintiffs and adopting that principle here, this Letters Patent Appeal must fail and be dismissed with costs.

S.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Kalia Goundan and others .. *Petitioners* (Counter-petitioners 1 to 4, 6 to 8, 11, 13 and 17 to 19 in Mis. Case No. 13 of 1929 on the file of the Court of the Joint Magistrate, Dindigul).*

Kalia Goundan *In re.*

Criminal Procedure Code (V of 1898), Ss. 107, 112 and 537—Jurisdiction—Proceedings instituted within local limits of—Transfer to another Magistrate outside—If competent—Order under S. 112—Contents of—Omission to state information received.

Where proceedings for keeping the peace were originally instituted before a Magistrate having jurisdiction, the subsequent transfer of the case to another Magistrate without jurisdiction does not render the proceedings incompetent.

*Cr. R.C. No. 963 of 1929. 21st March, 1930.
Cr. R.P. No. 867 of 1929.

2. (1911) I.L.R. 36 Bom. 268.
3. (1902) I.L.R. 26 Bom. 782.
4. (1926) I.L.R. 49 A. 67.
5. (1912) I.L.R. 34 A. 375.
9. (1913) 26 M.L.J. 23.
11. (1921) I.L.R. 44 M. 817: 41 M.L.J. 84.
12. A.I.R. 1928 M. 1255: 1928 M.W.N. 796.

Kalia Goundan, *In re.*

S. 112 requires that the order should set forth "the information received". An order which gives no indicatior tion on which the accused were believed to be threa of the peace is clearly defective and liable to be set asid

Failure of justice may be inferred from the fact tha the score of a defective charge was taken at an early permitted, would have afforded the accused an opportunit charge successfully.

Petition under sections 435 and 439 of the minal Procedure, 1898, praying the High Cour judgment of the Sessions Court of Madura in C No. 49 of 1929 preferred against the order of th Joint Magistrate of Dindigul in Mis. Case No. :

A. S. Mannadi Nair for *V. L. Ethiraj* and *daram* for petitioners.

N. S. Mani for *The Public Prosecutor* on Crown.

The Court made the following

ORDER.—This is a petition to revise an or tion 118 of the Criminal Procedure Code mac Magistrate of Dindigul requiring the petitioners ber to furnish security for keeping the peace for order was on appeal confirmed by the learned Se Madura.

Two objections are taken to the order com (1) that the Joint Magistrate of Dindigul had no make it, and (2) that the preliminary order un in which the proceedings were initiated was def did not contain the substance of the informatio

To understand the first objection the fact that the petitioners and the place where the al the peace was apprehended are within the jur Sub-Divisional Magistrate of Usilampatti. I against the petitioners and others under sectio stituted before that Magistrate, and he on the ber, 1928, made the preliminary order under sec upon the petitioners and others complained a cause. The District Magistrate then transferre Joint Magistrate of Dindigul. The latter Mag reason drew up another preliminary order u making formal changes in the order passed patti Magistrate but substantially in the that order. The petitioners showed cause, objections being that the order under se not definite enough as it did not contain

The Magistrate brushed this aside as a technical objection and stated that in his opinion the order does give particulars of the dispute and the reasons for apprehending a breach of the peace, and he added that the further details appeared as the prosecution unfolded its case. To return to the objection as to the jurisdiction, it is argued that the Joint Magistrate of Dindigul had no jurisdiction to proceed with the enquiry against the petitioners because neither were the petitioners living within the jurisdiction of that Magistrate nor was the place where breach of the peace was apprehended within his jurisdiction. It is contended that according to section 107 Magistrates other than a Chief Presidency Magistrate or District Magistrate are not only incompetent to initiate proceedings against persons residing beyond their jurisdiction in respect of breach of the peace beyond such jurisdiction, but they are also incompetent to hear cases under section 107 transferred to them by the District Magistrate where the persons and the places affected are not in their jurisdiction. For this contention no direct authority was forthcoming. But the decision in *Konda Reddy* v. *King-Emperor*[1] was referred to. That case is not on all fours with this. There the Magistrate before whom the proceedings under section 107 were initiated had not passed the preliminary order when the District Magistrate transferred the case to another Magistrate, and it was held that there having been not even an initiation or commencement of proceedings under section 107 before the Magistrate competent according to the terms of that section, the order of transfer did not confer jurisdiction on the Magistrate to whom it was transferred and that therefore the proceedings before him were incompetent. That case did not decide, because the facts were not so, that where a Magistrate having jurisdiction according to section 107 has made an order under section 112, the District Magistrate is not empowered to transfer the case so initiated to another Magistrate competent according to his grade or class to try this class of cases, although not qualified by the requirements of section 107 as regards territorial jurisdiction. On that limited proposition there appears to be no decision of this Court. But the point is covered by an authority, namely, *Surjya Kanta Roy Chowdhry* v. *Emperor*[2] which was referred to in *Konda Reddy* v. *King-Emperor*[1] with approbation. In the Calcutta case the precise point arose and it was decided in 1904 "that the intention of the legislature was to limit the jurisdiction in regard to the

1. (1917) I.L.R. 41 M. 246.

2. (1904) I.L.R. 31 C. 350.

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institution of proceedings to a Chief Presidency or District Magistrate; but that when such Magistrate has, in the exercise of his discretion, directed institution of proceedings, there is nothing in the law to prevent him from transferring the case to a Magistrate otherwise qualified to complete the proceedings." This decision has stood the test of subsequent amendments of section 107 and there is nothing in the amendment of 1923 to show that this view was not accepted as correct or that the legislature intended to alter it in any way. The result is that the Usilampatti Magistrate having first drawn up the preliminary order under section 112 the subsequent transfer of the case to the Dindigul Magistrate by the District Magistrate was authorised and the proceedings before the Dindigul Magistrate were competent. The first objection therefore fails.

The second objection relates to the defect in the order under section 112 and the objection is that that order does not, as it is required by section 112 of the Code to do, set forth "the substance of the information received." Upon the decisions on this topic there is no reasonable doubt as to what the intention of these words is. It is to give in substance an abstract of the facts upon which the Magistrate charges the persons proceeded against with being likely to commit a breach of the peace so as to give them notice of what they have to meet and be prepared to meet it. There are many instances of the practical application of this general rule, of which a very good one is found in *Kutti Goundan*, In re[3]. The general rule being as stated the question is whether in this particular case the order satisfies the requirements. Other decisions cannot be of much help on that point. The order upon which the Dindigul Magistrate proceeded was one drawn up by himself on 4th April, 1929, after the case was transferred to him. In one sense this was not the order on which he ought to have proceeded because the proceedings having been already initiated he could not initiate them over again and the order which he should have started upon was the order passed by the Usilampatti Magistrate on the 29th December, 1928. If there had been any material difference between the two orders that might alone have been a sufficient irregularity to invalidate all that followed. But as it happens, the order drawn up by the Dindigul Magistrate is, apart from formal changes necessitated by the change of venue, substantially the same as the order passed by the Usilampatti Magistrate, and, therefore, no more need be said about

3. (1924) 47 M.L.J. 689.

it. The new order drawn up was merely superfluous. The substance of both orders is this:

"That you . . . . . . formed yourselves into a faction espousing the cause of counter-petitioner 1 against Kamatchi Goundan of the same village in regard to the possession and enjoyment of a tamarind tope situated in S. No. 1592 of Odaipatti village and by the inimical attitude of yours against the said Kamatchi Goundan's faction, you are likely to commit breaches of the peace or disturb the public tranquillity or do wrongful acts that may probably occasion breaches of the peace or disturb the public tranquillity."

It will be noticed that no other fact is mentioned here except that there are two factions in the village and a dispute between them about a tamarind tope and that the counter-petitioners are on one side. It gives absolutely no indication as to what the information was upon which the counter-petitioners were believed to be threatening breaches of the peace. It would have left the counter-petitioners just as well informed on that point as if they were told: "You are wicked men. You have got enemies and therefore you are likely to commit breaches of the peace." In my opinion not only was there no attempt to state in substance the information received against the counter-petitioners but the order contained nothing from which they could know the case that they would have to meet. The order therefore was clearly defective. This was not, as the Dindigul Magistrate thought; a merely technical defect that it did not give the particulars or the reasons for apprehending a breach of the peace. On that ground the order is liable to be set aside.

But it has been argued for the Public Prosecutor that this defect does not vitiate the proceedings because it did not occasion a failure of justice. I do not question, at any rate I do not now want to question, whether a defect of this character is curable. But the question whether failure of justice has been occasioned in every case is one of fact. In this case the objection was taken before the Magistrate himself, and that, according to section 537, is always a circumstance from which failure of justice may be inferred. Whether it was in fact occasioned in this case cannot be disputed because the counter-petitioners did not have the information they were entitled to possess in the early stage of the proceedings and if they had possessed it at that time, they might have met it successfully. The order, therefore, must be set aside and the bonds given by the petitioners will be cancelled. I come with all the more confidence to this conclusion because this order passed in May, 1929, will in any case expire in two months more.

S.R. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Balasubramania Pandya Talavar .. *Appellant** *(Respondent)*

v.

Rm. P. Rm. M. Subramanian Chettiar .. *Respondent* *(Petitioner).*

Balasubramania Pandya Talavar *v.* Subramanian Chettiar.

Practice—Appeal—Money kept in deposit in Lower Court—Order of High Court permitting party to draw out—Condition regarding security to satisfaction of Lower Court—Decision as to sufficiency of security if appealable.

Where, pending the disposal of an appeal on its file, the High Court passes an order permitting the respondent to draw out some moneys kept in deposit in the Lower Court, after furnishing security for a certain amount to the satisfaction of that Court, an appeal does not lie against the decision of the Lower Court accepting the security tendered as being sufficient. In such a case it makes no difference that the words used in the High Court's order are that security should be furnished "to the satisfaction of the District Court" instead of "to the satisfaction of the District Judge".

Hoare & Co. v. *Morshead,* L.R. (1903) 2 K.B. 359 (C.A.), applied.

Appeal against the order of the District Court of Tinnevelly, dated 2nd day of April, 1930, in E.A. Nos. 416 and 422 of 1929 in O.S. Nos. 2 and 3 of 1922.

T. M. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar* for appellant.

K. S. Krishnaswami Aiyangar and *N. Srinivasa Aiyangar* for respondent.

The Court delivered the following

JUDGMENT.—A preliminary objection is raised that no appeal lies in this case. In C.M.P. Nos. 1612, 1613 and 1616 of 1929 Ramesam and Jackson, JJ., ordered that the respondent in this appeal might draw some amounts from the District Court on giving security to the satisfaction of the District Court. After an elaborate enquiry the District Judge found the security offered sufficient for a certain amount. This appeal is to the effect that the District Judge ought not to have been satisfied that the security was worth so much. No decision has been brought to our notice that an appeal lies in such a matter. On the contrary the principle of *Hoare & Co.* v. *Morshead*[1] is against it. Without discussing other reasons why the finding of the District Judge that the security offered is worth a certain amount does not come within section 47, Civil Procedure Code,

*A.A.O. No. 204 of 1930. 8th September, 1930.

1. L.R. (1903) 2 K.B. 359.

on the ground that the question was left to him by the order that the security must be to his satisfaction, we uphold the preliminary objection. In our opinion it makes no difference in this connection that the words used by the learned Judges were "to the satisfaction of the District Court" instead of "to the satisfaction of the District Judge."

Balasubramania Pandya Talavar *v.* Subramanian Chettiar.

This appeal is dismissed with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Unnaithanakath Puthan Veettil Kummakutty *alias* Kunhutti and another .. *Appellants** (*Defts.* 1 *and* 2).

v.

Munnodath *alias* Mangat Manakkal Karnavan and Manager Neelakandan Nambudri .. *Respondent* (*Plaintiff*).

Kummakutty *v.* Neelakandan Nambudri,

Civil Procedure Code (*V of* 1908), *O.* 21, *R.* 89—*Conditional payment —Court directing decree-holder to execute security bond before drawing out money—Legality—Suit to recover amount paid—Rule that suitor should not be prejudiced by act of Court—Applicability to case of unjust claim.*

A deposit under O. 21, R. 89, Civil Procedure Code, must be unconditional. Thus, the person making the payment, whether it be the judgment-debtor or a person other than the judgment-debtor, cannot insist that the decree-holder should not draw out the money except on furnishing security.

Where, on the application of the person making the deposit, the Court directed the decree-holder to execute a security bond, which contained a clause to the effect that under certain circumstances the amount must be brought back into Court, and the depositor having died, his representative subsequently sued on the basis of the security bond, claiming a refund of the money deposited,

Held, that the Court acted in excess of its powers in directing security to be furnished, and that the plaintiff was not entitled to recover the amount paid.

Kunja Behari Singha v. *Bhupendra Kumar Dutt,* (1907) 12 C.W.N. 151, *Narayan* v. *Amgauda,* (1920) I.L.R. 45 Bom. 1094 and *Raghu Ram Pandey* v. *Deokali Pande,* (1927) I.L.R. 7 Pat. 30, referred to.

Held further, that the plaintiff's claim for refund being, on the facts of the case, wholly inequitable and unjust, he could not claim the benefit of the rule that a suitor should not be prejudiced by the act of the Court.

Rodger v. *The Comptoir d'Escompte de Paris,* (1871) L.R. 3 P.C. 465, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A.S. No. 131 of 1927 (A.S. No. 262 of 1926 on the file of the District

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*S.A. No. 1521 of 1928. 10th March, 1930.

Kunmakutty v. Neelakandan Nambudri.

Court of South Malabar) preferred against the decree of the Court of the District Munsif of Tirur in O.S. No. 619 of 1923.

K. P. Ramakrishna Aiyar for appellants.

A. Parameswaran for respondent.

The Court delivered the following

JUDGMENT.—This appeal raises a question in regard to O. 21, R. 89, Schedule I, Civil Procedure Code. If a person other than a judgment-debtor pays money into Court under that section, can he insist that the decree-holder shall not draw the sum out without furnishing security?

The facts of the case take us so far back as 1905. One Sri Devi of Mudathode Illam conveyed in jenm to Thuppan Nambudri, the brother of the plaintiff, her entire property (consisting of 140 items). The sale-deed (Ex. I) is dated 16th October, 1905 and mentions the consideration as Rs. 16,000. The purchaser by that deed is directed to pay certain specified debts of the vendor and it then provides that he shall also be bound to pay up all other lawful debts due by her. Eramutti, the brother of the 1st defendant, filed against Sri Devi, O.S. No. 561 of 1905, claiming a certain amount as due. It was to Thuppan's interest, having regard to Ex. I, to get the suit dismissed. He accordingly fought the case on behalf of Sri Devi and lost it in spite of his vigorous defence. As the District Munsif points out, the case was fought out up to the High Court and it was decided that the debt claimed by Eramutti was due. Thuppan then became, under the terms of Ex. I, instantly liable to discharge this decree debt. He, however, committed default and the decree remained unsatisfied. Sri Devi, as I have said, by the sale-deed completely deprived herself of all property. Eramutti, in the circumstances, followed the only course open to him, that of attaching some items bought by Thuppan. The latter thereupon preferred a claim under O. 21, R. 58. The Court rejected it, observing that, the debt not having been discharged, the property conveyed under Ex. I remained liable. Even then, Thuppan did not honestly pay up the debt. He filed a regular suit (O.S. No. 414 of 1911) contesting the order rejecting the claim.

In the meantime the attached property was brought to sale. Thuppan applied in his suit that the sale might be stopped. On 23rd October, 1911, his application was dismissed. Every dilatory method was resorted to; he next applied that the sale

might be adjourned. The petition he filed (Ex. 3) contains the following significant statement:—

"The properties obtained by me from the defendant are proclaimed. The sale must be abjourned to enable me to produce the decree amount."

This application met with the same fate as the previous one. Thuppan then, determined to save his property, applied under O. 21, R. 89, for the setting aside of the sale. He made the deposit prescribed by that rule. But, before it could be drawn out by the persons entitled, he applied that security should be taken from the decree-holder. The Court, for some reason not disclosed, complied with this request and directed that security should be furnished. Ex. A, dated 18th December, 1911, was thereupon executed by the heirs of Eramutti, including the 1st defendant. It contains the clause that they would bring back the amount into Court, if Thuppan should succeed in the regular suit then pending.

The rest of the story may be briefly told. Thuppan won O.S. No. 414 of 1911, which dragged a weary length. The case went up as far as the High Court. All the Courts, that dealt with the suit in its various stages, held that the sale was valid; but the point to note is that the sale was upheld on the sole ground that Sri Devi acted honestly and got Thuppan to undertake by the deed to discharge her debts. There is one further fact which is important. Sri Devi's reversioners (Attaladakkam heirs) filed a suit questioning the alienation evidenced by Ex. I. Thuppan having died, his brother, Nilakandan, the present plaintiff, filed a written statement (Ex. 4). Seeking to justify the sale, he asserts that the terms of the sale-deed were carried out *and that the amount due to Kunhutti was fully paid up*. This statement (made in March 1921) implies that the deposit made by Thuppan under O. 21, R. 89, had the effect of discharging the decree debt. Whether this result follows in law or not, it shows that the plaintiff was conscious that he was under a moral duty to pay up the debt. It now suits him to suggest that he made a false allegation in the written statement, to defeat the claim of the reversioners. In any event, that allegation is inconsistent with the present claim based on the security bond. That claim is shortly this. Under the bond, if Thuppan's suit was decreed, the executants bound themselves to bring back the money. Now, Thuppan having succeeded, the plaintiff seeks to enforce the bond and claim the amount from the 1st defendant. It may be mentioned that this suit was filed in 1923.

The first question that arises is, was it competent to the Court to have taken the bond in question? To answer this question, one must have regard to the object and scope of O. 21, R. 89. The Code in various sections lays down in what circumstances a judgment-debtor may contest the sale of his property. Similarly, there are sections under which, a person claiming adversely to a judgment-debtor, may object to attachment and sale. But O. 21, R. 89, enacts a special provision. Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property; the decree-holder's claim is satisfied and the auction-purchaser is compensated. The section would be frustrated if the person paying money under it is permitted to do so under protest. Clause 2 of R. 89 enacts:

"Where a person applies under R. 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule."

This shows that the two proceedings referred to in this clause are utterly incompatible. If the debtor wants to keep a dispute open, he cannot claim the benefit of this section. In fact, this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decree-holder nor the purchaser are sacrificed. It follows from this that, when the judgment-debtor pays the amount specified, he pays it unconditionally. The payment followed by the order setting aside the sale has the effect of automatically extinguishing the decree debt. If an application is made under R. 89 and the deposit required by that rule is made within 30 days from the date of the sale, the Court has no option but to make an order setting it aside. (*See* R. 92.) This assumes that the decree debt is discharged and the decree-holder's remedy is gone. The section, then, is inconsistent with the notion that payment can be made either under protest or coupled with conditions.

I have so far dealt with the question on the footing that the person making the deposit is a judgment-debtor; but, under the rule, any person owning an interest in the property by virtue of a title acquired before the sale can make the application. Supposing such a person happens to be not a judgment-debtor but a third party, even then he is subject to the same restrictions. If the property is not liable to be attached for the debt, he can ignore the attachment and sale. If, on the other hand, it is liable, or he believes it to be liable, he can avail himself of this provision and get rid of the sale. But, in that case, he

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must be taken to have admitted the validity of the sale and it is not open to him either to dispute the sale or to get back the money. Take the case, for instance, of a debtor who, before the decree, had conveyed his property to trustees for the benefit of his creditors. The trustees, if they choose, may dispute the attachment and the Court-sale. But they may gain nothing by such a course, and, being under a duty to pay up the debt, may choose to take advantage of this provision. To hold that they would still be entitled to contest the sale, or, to claim a refund of the money, would be wholly opposed to the principle underlying the section.

This view receives support from several decisions. In *Narayan* v. *Amgauda*[1] the property was sold in execution of a decree obtained by the defendant against a third party, and purchased by the former. The plaintiff, claiming to be the owner of the property, protested against the sale and ultimately got it set aside under O. 21, R. 89, by paying the required amount into Court. The money having been paid over to the defendant, the plaintiff sued for a refund of it, as having been involuntarily paid. It was held that the amount must be taken to have been deposited *voluntarily and unconditionally,* and therefore no suit could lie for its recovery. Macleod, C.J., observes:

"If, then, the plaintiff, to suit his own convenience, got rid of the sale of the judgment-debtor's right, title and interest in the property by paying the decretal amount into Court, it is quite clear that he could not recover the amount as having been involuntarily paid."

In *Raghu Ram Pandey* v. *Deokali Pande*[2] a decree had been obtained by defendants 1 and 2 against defendant No. 3. In execution of that decree, a certain property was brought to sale and the plaintiff objected, stating that it belonged to him and not to the debtor, but his objection was disallowed. He then deposited the decretal amount and five per cent. under O. 21, R. 89 and got the sale set aside. The money was withdrawn by defendants 1 and 2 and the plaintiff filed the suit in question for a declaration that the property belonged to him and for a refund of the amount withdrawn. In spite of a finding that he was the owner of the property, his suit was dismissed on the ground that he was not entitled to get the money back. I quote the following passage from the judgment:—

"Once a payment is made under O. 21, R. 89, it is clear that the person making the payment cannot be heard to say that the sale was not a valid sale and that the money deposited should not be paid to the decree-

1. (1920) I.L.R. 45 B. 1094 at 1100.
2. (1927) I.L.R. 7 Pat. 30.

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holder. The judgment-debtor or the person interested is under no compulsion to make the deposit under O. 21, R. 89. Such a deposit is a voluntary deposit and the person making the deposit cannot in my opinion maintain a suit for a refund of the money deposited by him.''

The same view was taken in *Kunja Behari Singha* v. *Bhupendra Kumar Dutt*[3].

The case relied upon for the plaintiff, *Kanhaya Lal* v. *National Bank of India, Ltd.*,[4] does not help him. The defendant Bank had obtained a decree against the Delhi Cotton Mills Company and attached certain mills. The plaintiff, claiming to be the owner of the mills, paid the decree amount under protest and, having freed his property from the attachment, brought an action claiming a return of the money so paid. The Judicial Committee held that the procedure provided in the Code in regard to claims to attached property is merely permissive and the fact that such a procedure is open to him, if he chooses to adopt it, interferes in no way with his right to take any other lawful alternative. In that case, the money was paid before the sale and the payment was not made under O. 21, R. 89. The decision has clearly no application.

If this be the correct view, it follows that the Court had no right to take the security bond in question. It acted clearly in excess of its powers. But it may be contended that though its action was illegal, there is a higher rule which is called into play, namely,

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors . . ."

See *Rodger* v. *The Comptoir d'Escompte de Paris.*[5]

But the facts to which I have referred take the case clean out of this principle. The claim of the plaintiff is utterly inequitable and unjust. The District Munsif has carefully analysed the facts and stated them in detail. The Subordinate Judge, who has reversed his judgment, does not advert to them, and, confining his attention merely to the security bond, thinks that there are equities in favour of the plaintiff. The truth is, as I have shown, not only is there no equity in the plaintiff's claim, but all the equities appear to be the other way. The facts I have fully set forth and I do not propose to repeat them. It would suffice to point out again that first in 1911 Thuppan stated when applying for an adjournment of the sale that he would bring into Court the decree amount, and that in

3. (1907) 12 C.W.N. 151.
4. (1913) L.R. 40 I.A. 56: I.L.R. 40 C. 598: 25 M.L.J. 104 (P.C.).
5. (1871) L.R. 3 P.C. 465 at 475.

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1921, ten years later the plaintiff himself (Thuppan having in the meantime died) asserted in the reversioner's suit, that the decree debt had been fully paid up. These assertions show that Thuppan as well as the plaintiff were fully conscious of their obligation under Ex. I. The present claim is not only unjust but inconsistent with their own declarations.

The suit is dismissed, but I direct the plaintiff to pay only the costs of this second appeal. Some blame attaches to the 1st defendant who voluntarily executed the security bond and that is the reason why I do not propose to give him costs in the Courts below.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CORNISH.

Bethasami Naicken and another .. *Petitioners* (Plaintiffs)*

v.

Nagammal and others .. *Respondents (Defendants).*

Bethasami Naicken *v.* Nagammal.

Court Fees Act (VII of 1870), *S. 7, cl. (iv) (b) and (c), as amended by Madras Act V of* 1922 *and S. 28—Suit for declaration and partition—Court-fee payable—Civil Procedure Code (V of* 1908), *O. 7, R.* 10—*Plaint insufficiently stamped—Return of.*

A plaint praying for a declaration that the defendants have no right to certain immoveable property and for partition should be valued, under S. 7, cl. (*c*) of the Court Fees Act as amended by Madras Act V of 1922, at half the market value of the suit property.

As soon as the Court finds that the suit should have been instituted in some other Court, the plaint should be at once returned for presentation to the proper Court, whether it was sufficiently or insufficiently stamped.

Kandu v. *Konda,* (1884) I.L.R. 8 Mad. 62; *Kannuswami Pillai* v. *Jagathambal,* (1918) I.L.R. 41 M. 701: 35 M.L.J. 27: C.R.P. No. 901 of 1929; C.R.P. No. 959 of 1928 [57 M.L.J. 33 (sh. n.)] and *Ganesh Tavanappa* v. *Tatya Bharmappa,* (1926) I.L.R. 51 B. 236, followed.

Kandasami Goundan v. *Subbai Goundan,* (1923) 46 M.L.J. 345, not followed.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Periakulam, dated 25th February, 1929 and made in O.S. No. 125 of 1928.

N. S. Ramaswami Aiyar for petitioners.

B. Sitarama Rao for respondents.

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*C.R.P. No. 685 of 1929. 28th March, 1930.

Bethasami Naicken v. Nagammal.

The Court delivered the following

JUDGMENT.—The question which arises in tl sion Petition is whether a sufficient Court-fee o been paid. The plaint sets out a claim by the p alternative characters of members of a joint tenants-in-common for a declaration that the def right in certain immoveable property, and for a junction. The plaint contained a further praye tion of a 2|3rd share in items of immoveable p event of the Court holding the plaintiffs were t mon with a co-tenant since deceased. The plain that section 7, clause (*iv*) (*b*) of the Court Fees A valuation of the property for the purposes of C District Munsif rejected that contention, and I right. By section 7, clause (*iv*) (*c*) of the Cou amended by the Madras Court Fees Act, 1922, that in suits coming under sub-clause (*c*) (w suits to obtain a declaratory decree or order wher relief is prayed), where the relief sought is wit any immoveable property, the valuation shall n half the value of the immoveable property ca manner provided for by paragraph (*v*) of se means that the value is to be calculated on th of the property. The plaint undoubtedly cont for a declaratory decree and consequential relief claim to immoveable property, and the provis clause (*iv*) (*c*) of the Court Fees Act, therefor

A second point arises out of the order of th sif refusing to return the plaint until the plai the proper Court-fee upon the valuation of the by the Commissioner appointed for that purp trict Munsif justified his order by the ruling of *Kandasami Goundan* v. *Subbai Goundan*[1], wh Judge said that the Munsif was not justified plaint which was not properly stamped. It is however, that the learned Judge's attention doe have been drawn to *Kandu* v. *Konda*[2], where i the Munsif having discovered after enquiry tha of the lands in suit was beyond his jurisdicti correct procedure in returning the plaint. Neithe J.'s attention apparently drawn to the remark

1. (1923) 46 M.L.J. 345. 2. (1884)

Aiyar, J., in *Kannuswami Pillai* v. *Jagathambal*[3], which says of O. 7, R. 10, Civil Procedure Code: Bethasami Naicken *v.* Nagammal.

"I think it is clear that the legislature intended that as soon as the Court arrived at the conclusion at any stage of the case that the suit should have been instituted in some other Court, the plaint should at once be returned to be presented to the proper Court."

This principle has been accepted by Jackson, J., in a case reported in 57 M. L. J. 33 (sh. n.) and in a case —Civil Revision Petition No. 901 of 1929—recently heard before Anantakrishna Aiyar, J., and myself. It is also supported by the observations of Fawcett, J., in *Ganesh Tavanappa* v. *Tatya Bharmappa.*[4] On the balance of authority, therefore, I think the procedure which was followed by the District Munsif in this case was wrong, and that he should have returned the plaint at once when he discovered that the valuation was beyond his jurisdiction.

The learned counsel for the respondent has, however, argued that the Munsif had no right to return the plaint until it was properly stamped. And he has propounded an argument on section 28 of the Court Fees Act, which says that no document which ought to bear a stamp shall be of any validity unless and until it is properly stamped. But I think that this does not mean anything more than that a plaint until properly stamped is not effectual as a plaint for the purposes of the suit. It is not the less a plaint because it is not properly stamped.

The petition is accordingly dismissed in part and allowed in part. In the circumstances, each party will bear their own costs.

S.R. *Allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

V. K. Vaiyapuri Chetty .. *Petitioner* (Accused)*

v.

Sinniah Chetty .. *Respondent (Complainant).*

Criminal Procedure Code (V of 1898), Ss. 517 and 520—Charge for offence of theft not made out—Order regarding disposal of property seized—Second Class Magistrate passing order after going into merits—Revisional jurisdiction of District Magistrate—Mode of exercise. Vaiyapuri Chetty *v.* Sinniah Chetty

The petitioner was charged with the offence of theft of an omnibus but the 2nd Class Magistrate before whom the matter came up found the

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*Cr. R.C. No. 212 of 1930. 10th October, 1930.
Cr. R.P. No. 199 of 1930.

3. (1918) I.L.R. 41 M. 701 at 708: 35 M.L.J. 27.

4. (1926) I.L.R. 51 B. 236 at 241.

Vaiyapuri Chetty *v.* Sinniah Chetty.

charge to be unsustainable. The Magistrate, however, ordered the omnibus which had been seized by the Police to be delivered to the counter-petitioner, who had lodged the complaint. The District Magistrate on revision confirmed the said order on the ground that there had been a proper exercise of discretion by the trial Magistrate. The petitioner having preferred a further revision to the High Court,

Held, that the general rule, that where the offence charged is not made out the property seized should be returned to the person from whom it had been taken, should be given effect to in favour of the petitioner. The mere fact that two persons are quarrelling about possession of the property is not one of the special circumstances which take a case out of the general rule.

Srinivasamurthi v. *Narasimhalu Naidu,* (1927) I.L.R. 50 Mad. 916: 53 M.L.J. 309, followed.

Held further that the trial Magistrate having passed the order under S. 517 after taking evidence and estimating the probabilities, the District Magistrate should, when moved under S. 520, apply his mind to the same matters.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of South Arcot, dated 11th December, 1929, and made in C.R.C. No. 38 of 1929, preferred against the judgment of the Court of the 2nd Class Magistrate of Tittagudi in C.C. No. 130 of 1929.

V. L. Ethiraj for petitioner.

K. S. Jayarama Aiyar and *G. Gopalaswami Aiyar* for respondent.

The Court made the following

ORDER.—The petitioner seeks in revision to set aside the order of the 2nd Class Magistrate, Tittagudi, under section 517, Criminal Procedure Code, confirmed by the District Magistrate, South Arcot, under section 520, Criminal Procedure Code, giving possession to counter-petitioner of an omnibus taken from the petitioner by the Police. The charge of theft lodged by the counter-petitioner against the petitioner under section 379, Indian Penal Code, was found to be unsustainable.

The case-law on this subject is as follows:

In *Syed Mohideen Sahib,* In re[1] it is laid down that the property should ordinarily be delivered to the person by whom it has been produced; and if there is a *bona fide* dispute the Magistrate may impose conditions upon that person. This is followed in the next case, and purports to be followed in the next after that, where In re *Annapurnabai*[2] is cited to the same effect.

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1. (1883) 2 Weir 667 (Cr. R.C. No. 892 of 1883).
2. (1877) I.L.R. 1 B. 630.

Vaiyapuri Chetty v. Sinniah Chetty.

In *Kanagasabai* v. *Emperor*[3] it is ruled that the Magistrate has jurisdiction to decide the question of possession, and In re *Sadashiv*[4] supports that rule. *Srinivasamurthi* v. *Narasimhalu Naidu*[5] lays down that in the absence of special circumstances the property must be returned to the person from whom it was taken.

The general effect of these rulings is that the Magistrate has a discretion to decide the question of possession, but it is very rarely that that discretion if properly exercised will go beyond restoring the property to the party from whom it was taken. But probably the question how far a Magistrate's discretion under section 517, Criminal Procedure Code, should extend, is better answered by reference to fundamental principle than by any attempt to piece together a coherent system from various rulings. It is manifest that Criminal Courts are not expected to try civil causes. The one exception is when, in order to prevent a breach of the peace, a Magistrate decides *prima facie* the question of possession. But it would be an odd extension of that exception if a section were to be drafted into the Code: whenever a Magistrate is satisfied that the police have erroneously attached property where no offence has been committed, he shall require the parties claiming possession of that property to put in their respective claims. Merely from a practical point of view, apart from principle, a provision of that sort would obviously be a direct stimulus to false charges, for parties would jump at the opportunity of settling claims of possession so expeditiously and so cheaply.

It may seem, therefore, that the simple rule should be that if no crime is made out the Magistrate should return the property to the party from whom it was taken. But that rule is just too simple. Suppose, to take a common example, the accused person whom the Magistrate acquits, has pleaded that the property was foisted upon him. There would then be no sense in the Magistrate telling him to keep it. Other instances can no doubt be imagined, but, except in these special cases, the Magistrate should return the property to the person from whom it was taken. The same rule is laid down in *Srinivasamurthi* v. *Narasimhalu Naidu*[5] in almost identical terms on page 919. It should be returned to the person from whom it was seized unless there are special circumstances which would

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3. (1910) I.L.R. 34 M. 94: 20 M.L.J. 425.
4. (1908) 11 Bom. L.R. 16.
5. (1927) I.L.R. 50 M. 916: 53 M.L.J. 309.

Vaiyapuri Chetty v. Sinniah Chetty.

render such a course unjustifiable. The mere parties are quarrelling about possession is not one circumstances which take a case out of the gene

In this case therefore the Magistrate shoul returned the omnibus to the accused from whom and the brief order of the District Magistrate t been a proper exercise of discretion would the tionable. But if, on the other hand, the Magis allowed to try the civil cause, to weigh evidenc mate probabilities the District Magistrate when section 520 would have to show that he had ap to the same matters. Otherwise, it would not cause decided by a Criminal Court but one d privilege of appeal.

In the light of the above observations it is go into the merits of this case; but it may be obs dispute is not one which admits of ready solution, possible that the Sub-Magistrate has erred. He fi para that the omnibus was obviously in possessi on the date of the offence, overlooking that on ing there has been no offence at all. What h said is that the omnibus was obviously in pos accused when the police intervened. In his 5th out how flimsy is the case of P.W. 1. The s produced, the alleged payment to Addison & Co ed, and to get over his own signature in Ex. I, fall back upon the time-worn plea that he signed which the accused has filled up, confessing at that no one was present when he signed it. I trate says that even by D.W. 1's evidence the pay Rs. 200 to P.W. 1 before the re-transfer o D.W. 1 does not say so. He says that he saw Ex. I, and accused promised to pay him Rs. 200 There is no suggestion that pending the paymen to keep the omnibus.

The 2nd Class Magistrate's order cannot supported on its merits, and furnishes a good advisability of keeping these civil disputes ou Courts.

For the above reasons the orders of the Lo cancelled and the omnibus is ordered to be d petitioner. The petition is allowed.

B.V.V. P.

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces, Nagpore.]

PRESENT:—LORD TOMLIN, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Maulana Mohammad Ibrahim Riza Malak .. *Appellant**

v.

The Commissioner of Income-tax, Nagpur .. *Respondent.*

P.C.

Maulana Mohammad Ibrahim Riza Malak *v.* The Commissioner of Income-tax, Nagpur.

Income-tax Act (XI of 1922), S. 4, Sub-S. (3) (i)—Trust property held by head of religious community—Income not applied "wholly for religious or charitable purposes"—Exemption from assessment to income-tax.

The head of a religious community executed certain deeds whereby he declared that the properties vested in him were held on trust for purposes, such as, "for carrying on the agricultural, industrial, commercial and other pursuits of the said community", "for entertaining guests, giving at homes or parties" and "for such donations for charitable or religious purposes, contributions to memorials, funds raised for holding social, educational, religious, industrial or political conferences" etc., which the spiritual head for the time being might deem fit. A succeeding head of the community having been assessed to income-tax on the income of the properties vested in him,

Held, that the said income was applicable to purposes, many of which were neither religious nor charitable, and the same was not exempted from assessment to income-tax under S. 4, Sub-S. (3) (*i*) of the Income-tax Act.

Appeal No. 50 of 1929 from a judgment, dated the 4th August, 1927, of the Court of the Judicial Commissioner, Central Provinces, delivered on a reference which the appellant in the course of an assessment upon himself required the Commissioner of Income-tax to make under section 66 of the Income-tax Act, 1922.

Dunne, K.C. for appellant.

De Gruyther, K.C. and *Wallach* for respondent.

19th May, 1930. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—In this case the appellant seeks to displace an assessment to income-tax made upon him in respect of property vested in him as the head of a community which is a sect of the Dawood Borah tribe, located at Nagpur. The community have, apparently, a common stock, all the property being

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*P.C. Appeal No. 50 of 1929. 19th May, 1930.

P. C.

Maulana Mohammad Ibrahim Riza Malak *v.* The Commissioner of Income-tax, Nagpur.

Lord Tomlin.

vested in the head of the sect. The property is utilized in part in carrying on a series of shops, the profits of the trade being treated as part of the income of the community.

In the Courts below the appellant rested upon certain trust deeds executed, one on the 25th August, 1917, and the other on the 25th November, 1922. By the first deed the then head of the community declared the trusts of the property vested in him, and by the second deed the trusts of the same property were explained and expanded.

Their Lordships think that the short point which this appeal raises is, whether, having regard to the terms of those deeds, the income of the property vested in the head of the community is exempt from income-tax, having regard to the provisions of section 4, sub-section 3 (*i*) of Act XI of 1922. That sub-section of section 4 is in these terms:

"This Act shall not apply to the following classes of income: (*i*) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied or finally set apart for application thereto."

A glance at the documents on which the appellant has founded himself in the Courts below makes it plain that the income of the trust property is applicable to purposes, many of which are neither religious nor charitable. It is only necessary to refer to one or two of the clauses of the first deed to establish that proposition. Clause 3, which indicates some of the purposes for which the property is held, is: "For carrying on the agricultural, industrial, commercial and other pursuits of the said community." Clause 5 is: "For entertaining guests, giving at homes or parties." Clause 6 is: "For such donations for charitable or religious purposes, contributions to memorials, funds raised for holding social, educational, religious, industrial or political conferences or congresses, and for public entertainments," as the then spiritual head, and, after him, the spiritual head for the time being, may deem fit. Their Lordships think that these extracts establish that the income is not "income derived from property held under trust or other legal obligation wholly for religious or charitable purposes." Nor is it suggested that any part of the property is set aside for any charitable or religious purposes, so that it can be identified as appropriated exclusively to such purposes.

In these circumstances the conclusion which has been arrived at by the Court below seems to their Lordships to be correct.

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It perhaps is right to add that it was suggested that some comfort could be found by the appellant from a deed of the 9th June, 1894, in which certain property was vested in the then head of the community upon religious or charitable trusts; but no attempt has been made, either here or below, to identify the property, the subject of that trust, with any of the property now said to be subject to tax. Their Lordships think that in the absence of any evidence of identity and having regard to the fact that throughout, in the Courts below, the later deeds only have been founded upon, it is not open to the appellant to assert before their Lordships' Board that the deed of the 9th June, 1894, has any relation to the matter.

In their Lordships' opinion the appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for respondent: *Solicitor, India Office.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

T. S. Venkataramana Aiyar and another .. *Petitioners** *(Counter-petitioners)*

v.

Kuppuswami Aiyangar and another .. *Respondents* *(Petitioner).*

Madras Local Boards Act (XIV of 1920), *S.* 51 (4)—*Antiquated electoral roll.*

Venkataramana Aiyar *v.* Kuppuswami Aiyangar.

An electoral roll once prepared and published remains in force till the publication of a fresh roll. In the absence of anything in the section to limit its operation to the particular year of its publication or to the close of the next, an election is not invalid merely for the reason it was conducted on the basis of an antiquated electoral roll prepared about six years before.

Singaram Chettiar v. *Srinivasa Aiyangar* (1926) I.L.R. 50 Mad. 726: 53 M.L.J. 545, distinguished.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of Salem, dated 20th April, 1929, and made in O.P. No. 27 of 1929.

T. M. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for petitioners.

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*C.R.P. No. 828 of 1929. 26th March, 1930.

Venkataramana Aiyar v. Kuppuswami Aiyangar.

The Advocate-General, T. V. Muthukrishna Aiyar, B. V. Viswanatha Aiyar and *U. Ramachandran* for respondents.

The Court delivered the following

JUDGMENT.—This is a revision petition against the order of the District Judge of Salem setting aside the election of the petitioner before me for the first ward of the Union of Trichengode in the Salem District. The facts of the case are as follows:—The Madras Government dissolved the Trichengode Union under section 45 of the Local Boards Act and passed an order that another Board should be re-constituted. They appointed an officer immediately to exercise the powers of the Board and he was directed to re-constitute a Union Board by arranging for elections in respect of such members as have got to be elected and they directed also the Taluk Board of Sankari to nominate the members that have got to be nominated after the elections are over. All this is to be done as soon as possible. Accordingly the Special Officer appointed proceeded with making arrangements for the election of members for the first ward among other elections. In this election the petitioners before me were elected. The respondent before me filed the petition O.P. No. 27 of 1929 for the purpose of setting aside the election on the ground that the electoral roll on the basis of which the election was conducted was the roll prepared for the year 1923-24 and no other later roll was prepared. It is said that the old electoral roll contains names of persons who are dead and of persons who are unfit to be voters and does not contain persons who are fit to be voters. It was contended on behalf of the petitioners that that does not matter. Under section 51 (4) an electoral roll published in any year shall remain in force till the publication of a fresh electoral roll. The District Judge disallowed this contention of the petitioners before me holding that S. 51 (4) applies only to cases happening in the interval between April and July of any year. The rules prescribed that a tentative list will be published on the 30th April of each year and after hearing objections, if any, the final list should be published on the 1st July. The District Judge thinks that only in the case of elections between the 30th of April and the 1st of July clause 4 of section 51 operates and that in all other cases where the rules are broken the election is bad because it is based on an electoral roll not prepared according to the rules under the Act. But if this were the object of the section, clause 4 of section 51 would not have been worded in the very wide language in which it is framed. The

learned Advocate-General who appears for the respondent and supports the order of the District Judge does not in fact contend for the very narrow construction of the learned District Judge. He contends that the object is to provide for delays in the preparation of electoral rolls when one is being prepared to carry out the obvious intentions of the Act, and it does not apply to a case where the directions of the Act are openly disregarded and no efforts are made to prepare electoral rolls for a period of 5 or 6 years. There is something to be said in favour of such a construction. At any rate it is reasonable. But where the section is worded in such a way that it gives no scope to make such distinctions, its obvious effect must be carried out. It may be that the legislature never contemplated such flagrant disobedience of the directions of the Act as it has happened in Trichengode. We do not know why they did not contemplate such disobedience. Either the legislative might have thought that some higher authority would have set it right or such instances would not happen. In the present case, I am informed that the Trichengode Union was not dissolved for its failure to carry out the provisions of the Act in this matter but really for some other delinquency, so that, but for the delinquency in some other directions, the Union Board would have gone on disregarding the provisions of the Act for many years without anybody finding fault with it. But we are not concerned with all these things. The Act says that the electoral roll published in any year, shall remain in force till the publication of a fresh electoral roll. If it is intended that such a provision should apply only during the course of the year, there is nothing to prevent the legislature from saying so, that is "shall remain in force till the termination of that year". The learned Advocate-General suggested that there may be some delay in the preparation of the roll for the next year. If it is intended that the provision should operate until the termination of the next year, then there is nothing to prevent the legislature from saying so, that is from saying "shall remain in force till the termination of the next following year". Once we begin to make distinctions of this kind, we do not know where the line is to be drawn. Until the legislature makes its intention plainer, my plain duty is to give effect to the clause of the Act. Moreover, having regard to section 45 (1) of the Government notification, the policy of the legislature is that no time should be lost in the reconstitution of another Union Board. If one is to wait for a proper electoral roll and then only to proceed with the election of the members of the Board, the

Venkataramana Aiyar *v.* Kuppuswami Aiyangar.

Board will not be constituted immediately. Rul the electoral roll say that a tentative list should b the 30th of April and the final list on the 1st of present case the Special Officer was appointed 1928. He has to wait till July, 1929. Then th nations to be made. The constitution of the Bc delayed much longer than is contemplated by th diately' in section 45 or in the G. O. the policy of the Act is that the old electoral ro tinue in order to avoid delays of several kinds, nam delay for a few months or for a year, delay du disobedience to the superior authorities, or gross on the part of the Union Board, etc. That is th the legislature and there is no use of complaini To proceed upon an antiquated electoral roll is re several voters of their votes. This may be so c so; it is my duty to give effect to the section. Advocate-General relied on a decision in *K. R. Chettiar* v. *K. Srinivasa Aiyangar*[1]. That to election of members to a Temple Committ under the Hindu Religious Endowments Act. Th a register to be kept. It appears from the fact that for 8 years no register has been revised an Kumaraswami Sastriar and Curgenven, JJ., held tion was not proper. But in that Act there is 1 section 51 (4) of the Local Boards Act. The that case can only apply to cases where there is n is clear from the judgment of Curgenven, J., at pa he says:

> "Unless there is some provision to the contrary, th election depends upon the regularity of the procedure ac it is held . . . ."

Here we have got an express provision th irregularity however gross will not render an e namely, the want of a fresh electoral roll. For I do not see any reason to limit the operation of of the Local Boards Act. I set aside the order Judge holding that the election of the petitione valid and dismiss the 1st respondent's petition below with costs of the petitioners both here an below. I also set aside the order of the Distric

1. (1926) I.L.R. 50 M. 726 at 732: 53 M.L.J

ing the holding of a fresh election after the preparation of a new electoral roll.

Venkataramana Aiyar v. Kuppuswami Aiyangar.

S.R. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE BARDSWELL.

The District Labour Officer, Amalapuram .. *Appellant** *(Respondent)*

v.

Veeraghanta Venkatasubramania Sastri .. *Respondent* *(Claimant)*.

The District Labour Officer, Amalapuram v. Venkatasubramania Sastri.

Land Acquisition Act (I of 1894), S. 9 (3)—Notice of fifteen days—Enquiry whether can be held on fifteenth day after service—Desirability of giving more than fifteen days notice.

The expression "not earlier than fifteen days", when applied to a notice under S. 9 (3) of the Land Acquisition Act, means that the claimant is to have fifteen days clear before he need appear and consequently the enquiry before the Acquisition Officer cannot be held on the fifteenth day after the service of the notice.

Taraprasad Chaliha v. *Secretary of State*, (1929) I.L.R. 57 Cal. 837, followed.

Semble: It will be wise if Acquiring Officers give more than fifteen days clear notice in the notices issued by them under S. 9 of the Land Acquisition Act.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram, dated 15th March, 1928, and made in O.P. No. 4 of 1926.

The Government Pleader (P. Venkataramana Rao) for appellant.

M. Appalacharya and *Jhiddu Lakshmayya* for respondent.

The judgment of the Court was delivered by

Wallace, J.

Wallace, J.—This is an appeal against the decision of the Lower Court in the matter of the compulsory acquisition of the claimant's land. 32 cents belonging to him were acquired. The land is situated in old Survey No. 215, now Re-Survey No. 142, in Kattunga village. The Acquiring Officer gave an award at the rate of Rs. 10 per cent., which the Lower Court has increased to Rs. 15. There was also a tamarind tree acquired for which the Acquiring Officer gave an award of Rs. 80 which has been increased by the Lower Court to Rs. 120. Government appeals against the decision of the Lower Court and the claimant has filed a memorandum of cross-objections.

The learned Government Pleader on behalf of the Government has argued a point of law as well as argued the case on

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*Appeal No. 1 of 1929. 15th September, 1930.

The District Labour Officer, Amalapuram *v.* Venkatasubramania Sastri.

Wallace, J.

the merits. The point of law is this. The notice about the enquiry was served upon the claimant on 19th August, 1925 and it directed him to appear on 3rd September, 1925. Section 9 (3) of the Land Acquisition Act directs the Collector to serve notice on the claimant to the same effect as the notice in sub-section (2). The notice in sub-section (2) is to notify the claimant to appear before the Acquiring Officer "at a time and place mentioned therein, such time not being earlier than fifteen days after the date of publication of the notice."

When that is applied to sub-section (3) it would mean that the notice to be served upon the claimant should direct him to appear at a time not earlier than fifteen days after the service of the notice. The question is whether "not earlier than fifteen days" means that the claimant is to have fifteen days clear before he need appear, that is, before the date of the enquiry or whether the date of enquiry may be on the 15th day. The language used seems to us unhappy and there is something to be said for an interpretation either way. The only reported case exactly on the point to which our attention has been called is in *Taraprasad Chaliha* v. *The Secretary of State for India in Council,*[1] where a Bench of the Calcutta High Court has decided for the present claimant's view. No particular reasons are given, but in the circumstances and having regard to the fact that if there is any real dubiety in interpretation in matters of procedure like that, the benefit of the doubt ought to be given to the party, we follow the interpretation of the phrase given by the learned Judges in Calcutta. We might add that in order to avert further difficulties of the same kind in future, it would be wise if Acquiring Officers gave more than fifteen days clear notice in the notices issued under section 9.

It is, therefore, open for us to go into the merits of the case, the claimant not being precluded from putting forward his case although he did not object under section 9, since the notice given to him was defective.

[His Lordship dealt with the question of compensation and concluded:]

The appeal, therefore, is allowed to the extent of the reduction of the price of the tamarind tree to Rs. 80, and as to costs we direct that each party shall bear his costs here. The Memorandum of Objections is dismissed.

B.V.V. *Appeal allowed in part.*

Memorandum of Objections dismissed.

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1. (1929) I.L.R. 57 C. 837 at 840.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

P. R. Srinivasa Aiyar .. *Petitioner** (*2nd defendant*)

v.

K. S. Krishnaswami Aiyar and others .. *Respondents* (*Plaintiff and Defendants* 1, 3, 4 *and* 5).

Court Fees Act (*VII of* 1870), *S.* 7 (*iv*) (*b*) *and* (*v*)—*Hindu joint family—Prior division in status—Subsequent suit for partition by metes and bounds—Court-fee payable.*

Srinivasa Aiyar *v.* Krishnaswami Aiyar

Where the plaintiff stated in his plaint that the Hindu joint family, of which he was a member, had become divided in status on a prior date and prayed for the partition of the immoveable properties by metes and bounds,

Held, that the plaint did not fall under S. 7 (*iv*) (*b*) of the Court Fees Act and the valuation of the suit should be according to the market value of the properties.

Observations of Krishnaswami Aiyar, J., in *Rangiah Chetty* v. *Subramania Chetty*, (1910) 21 M.L.J. 21 (F.B.), relied on.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of Trichinopoly, dated 16th November, 1928, in C.M.A. No. 29 of 1928 preferred against the order of the Court of the District Munsif of Karur, dated 5th April, 1928, in O. S. No. 25 of 1926.

T. M. Krishnaswami Aiyar and *S. S. Ramachandra Aiyar* for petitioner.

K. G. Srinivasa Aiyar for respondents.

The Court delivered the following

JUDGMENT.—This application raises the question whether a suit should be valued notionally or *ad valorem*, the decision of which will also involve the further question of jurisdiction. The learned District Judge has held that the suit can be valued notionally setting aside the order of the learned District Munsif that the valuation should be according to the market value. The respondent frankly admits that the judgment of the learned Judge can only be supported if it is found that this suit falls under section 7 (*iv*) (*b*) of the Court Fees Act. The plaintiff states in his plaint that the family has been divided in status since 1921 and now he sues for a partition by metes and bounds. Is it a suit to enforce the right to share in any property on the ground that it is joint family property? This is by no means an easy question to decide, but I think it is answered authori-

*C.R.P. No. 297 of 1929. 4th April, 1930.

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tatively by *Rangiah Chetty* v. *Subramania Chetty*[1]. Krishnaswami Aiyar, J., observes at page 26:

"There is a joint family at the date of the suit. The plaintiff's right to have the property divided is on the ground that the property belongs to the joint family on that date"

and at the bottom of page 24:

"It must be admitted that a suit by a tenant-in-common in joint possession for the partition of the common property not belonging to a joint family cannot fall under this clause."

When a coparcenary has been disrupted, it cannot I think be described as a joint family though the property of the family has not been divided by metes and bounds. Therefore in the light of this interpretation the plaint would not fall under section 7 (*iv*) (*b*); and reading section 4 along with section 8 of the Suits Valuation Act it must be held that the valuation in this case cannot be notional. No argument has been advanced in this Court as regards the cancellation of the sale-deed which the plaintiff prefers to treat as void—a matter on which I need express no opinion. In so far as the ruling of the learned District Judge is not set aside, the District Judge's order as regards other matters will stand. In the result, therefore, the plaint will have to be returned for presentation to the proper Court.

The petitioner will have his costs.

B.V.V. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Thoomulur Anantapadmanabiah .. *Petitioner* (Accused).*

Anantapadmanabiah, *In re.*

Criminal Procedure Code (V of 1898), Ss. 107, 112 and 548—Proceedings under S. 107—Person against whom order was drawn, applying for a copy of the information given by the Police—Refusal by the Magistrate—Whether the person is entitled to a copy—Meaning of words "the record" in S. 548—When does the record begin in proceedings under S. 107.

On the question whether a person, against whom a Magistrate had drawn up an order under S. 112, Criminal Procedure Code, asking him to show cause why he should not be bound over to keep the peace under S. 107, was entitled to obtain a copy of the written information given by the police on which the order was based,

Held, that the information or report of the Police in this case was not part of the record within the meaning of S. 548, Criminal Procedure Code, and that the petitioner was not entitled to a copy of it.

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*Cr.R.C. No. 516 of 1930.
Cr.R.P. No. 479 of 1930. 22nd September, 1930.

1. (1910) 21 M.L.J. 21 (F.B.).

Ranga Reddi v. *King-Emperor,* (1919) I.L.R. 43 M. 450: 38 M.L.J. 97; *Kutti Goundan,* In re, (1924) 47 M.L.J. 689 at 692 and *Queen-Empress* v. *Arumugam,* (1897) I.L.R. 20 M. 189: 7 M.L.J. 167 (F.B.), referred to. Anantapadmanabiah, *In re.*

The record under S. 548 is the magisterial record and such record in proceedings under S. 107 begins usually with the order under S. 112, except where a Magistrate not empowered under S. 107, wishes to have proceedings taken under it and issues a warrant under clause 3 of the section.

The Magistrate acting under S. 107 is not bound to disclose the sources or the nature of the information received.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate of Nellore, dated 26th July, 1930, and made in M.C. No. 39 of 1930.

C. Rama Rao Sahib and *G. Sivaramakrishna Sastri* for petitioner.

N. S. Mani for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The question raised in this case is whether a person against whom a Magistrate has drawn up an order under section 112, Criminal Procedure Code, asking him to show cause why he should not be bound over to keep the peace under section 107 is entitled to obtain a copy of the written information given by the Police on which the order is based. The Magistrate refused to grant the copy holding that it is not a charge-sheet, as the petitioner described it in his application. That it is not a report under S. 173, Criminal Procedure Code, copy of which should under clause 4 of that section be furnished on application and payment to the accused, is clear enough. Because the section is in terms confined to reports made on investigation under Chapter XIV of the Code. But this does not dispose of the matter. Section 548 (leaving out the immaterial words) provides that "if any person affected by an order passed by a Criminal Court desires to have a copy of . . . 'other part of the record' he shall, on applying for such copy, be furnished therewith. The petitioner was clearly affected by the order under section 112 requiring him to show cause. If the information by the Police on which the Magistrate founded his order can be brought within the words "part of the record", he is entitled to a copy. No direct decision on the point has been brought to my notice. But there are observations of more

Ananta-padmanabiah, *In re.*

or less indirect application. In *Ranga Reddi* v. where the point for decision was whether and to order under section 112 should set out particula mation and whether evidence of repute was a charge under section 110, clause (*f*), Seshagiri pointing out that it is of the utmost importance mation communicated to the accused under sec be clear and specific, says at p. 451:

"The accused is to be put on his trial on inf behind his back. In the case of a complaint the accuse to a copy if he applies for it, but in the case of an i kind, which *ex necessite* is a confidential one, the acc be told the nature and extent of the information on wh intends to take the action against him."

This passage is cited by Madhavan Nai *Goundan,* In re[2] in another similar case whe for decision was whether the order under sectic ed sufficient particulars to enable the accused to defence and to summon witnesses on his side b enquiry commences. In both cases the learned that the accused is not entitled to a copy of the the Magistrate and it may also be pointed out ence on particulars in the order under section great extent be superfluous if the accused were e copies of the information on which that orde the same time it cannot be denied that in n section 548 under consideration nor were the considering whether the report of the Police on under section 112 is based is "part of the recor order is made.

On the other side there are observations c learned Judges in a contrary sense in the well-kr decision in *Queen-Empress* v. *Arumugam*[3]. Th cided in 1896 before the amendment of section cused persons to get copies of charge-sheets und The question related to copies of Police report 157, 168 and 173 of the then Code. Of the fou who constituted the Court three held that rep tions 157 and 168 were not public documents a the accused were not entitled to copies of the was equally divided as to reports under section holding that they were and the other two tha

1. (1919) I.L.R. 43 M. 450: 38 M.L.J.
2. (1924) 47 M.L.J. 689 at 692.
3. (1897) I.L.R. 20 M. 189: 7 M.L.J. 167

public documents of which the accused could get copies. The two referring Judges at page 192 say with reference to the argument founded on section 548 that if an order has been made on a Police occurrence report or charge-sheet affecting the person accused such as an order for his arrest or for his remand to custody, he is *ipso facto* entitled to a copy of that document under the express terms of section 548 of the Code of Criminal Procedure. At page 206 Benson, J., refers to the argument based on section 548. He was of opinion that the argument would succeed if the Magistrate making the order is at the time a Criminal Court. He rejected the argument as he thought that a Magistrate is not a Court when enquiring into offences which he is not empowered to try. This distinction between Magistrates and Courts is no longer valid after the decision of the Privy Council in *Clarke* v. *Brojendra Kishore Roy Chowdhury*[4] and there can be no doubt that a Magistrate acting under section 112 is a Court. It would, therefore, seem that but for this distinction which did not exist, Benson, J., would have upheld the view of the referring Judges as to section 548. There is, however, no denying the fact that these were observations, not decisions, and that they were made with respect to Police reports made under Chapter XIV and not to Police reports or information to a Magistrate with a view to his taking action under Chapter VIII.

In this state of authority, I have to decide the point before me on a consideration of the words of section 548 and such considerations as may be based on the nature of proceedings under section 107 of the Criminal Procedure Code. In brief, what is meant by "the record" and when does "the record" begin in proceedings under section 107? On the best consideration I can give to the matter, I think the record intended is the magisterial record and such record in proceedings under section 107 begins usually with the order under section 112, except where a Magistrate not empowered under section 107 wishes to have proceedings taken under it and issues a warrant under clause 3 of that section. The information which leads to action under section 107 may be of the most varied kind. It may be oral, sworn or not sworn, and need not be in writing. It may be from any source, official or unofficial, formal or informal. It may be derived from the Magistrate's own knowledge. He is not bound to disclose the source or the nature of the information received. See *In the matter of the petition*

4. (1912) L.R. 39 I.A. 163: I.L.R. 39 C. 953 at 966: 23 M.L.J. 32 (P.C.).

Ananta-padmanabiah, *In re.*

of Mithu Khan[5]. I am, therefore, of opinion that the information or report of the Police in this case was not part of the record within the meaning of section 548, Criminal Procedure Code, and that the petitioner is not entitled to a copy of it. The petition must be dismissed.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE BARDSWELL.

Adivi Suryaprakasa Rao and others .. *Appellants**
(*Defendants* 1, 2, 6 *and* 7)

v.

Tummalapalli Sreeramulu and others .. *Respondents*
(*Plaintiffs* 1 *to* 5 *and* 8*th Defendant*).

Suryaprakasa Rao *v.* Sreeramulu.

*Hindu Law.—Joint family—Suit against father and sons—Sons minors at the time of the suit—Decree for delivery of possession of property and past and future mesne profits—Mesne profits directed to be determined in execution—*Ex parte *order in execution—Gross negligence on the part of guardian* ad litem*—Whether order against minors would be vitiated—Whether also it could stand against the adult members of the joint family.*

The first appellant was the plaintiff in a suit against the respondents, respondent I being the father of the minor respondents 3, 4 and 5, and got a decree for delivery of possession of property with past and future mesne profits at a certain rate. The decree was appealed against by the respondents and was confirmed, though with regard to future mesne profits it was felt by the Appellate Court that it should be determined in execution. The appellant brought an execution petition for determining the future mesne profits. The 1st respondent who was guardian *ad litem* to the respondents 3, 4 and 5 as well as the 2nd respondent who was also a member of the same joint family, allowed the petition to be decreed *ex parte*, and the order passed, gave a much higher rate of future mesne profits to the appellant. In a suit by the respondents as plaintiffs, that the order was not binding on the minors since it was obtained owing to gross negligence of their guardian *ad litem*, and that it could not be enforced against the 1st and 2nd respondents either, all being members of one joint family, the Lower Court decreed in their favour on both the points.

Held (1) that though gross negligence by itself was not a legal ground for setting aside a decree or order, it being further shown that the interest of the minors thereby was prejudiced, the decision of the Lower Court should not be interfered with, and

(2) that the joint liability for mesne profits of all the plaintiffs being one and indivisible, the decree against all the plaintiffs was based on a common ground. It was thus impossible to do justice to the minor members of the joint family unless the matter of the whole liability of the joint family, that is, of the adult members also was reopened.

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*Appeal No. 265 of 1925. 29th August, 1930.

5. (1904) I.L.R. 27 A. 172.

of their guardian *ad litem* in allowing the proceedings to be adjudged *ex parte*. Plaintiffs 1 and 2 contend that the decree in the execution petition was obtained by fraud and consequently is not binding upon them. They also maintain that,

that the interests of the minors were thereby gravely prejudiced; in other words, they had a *prima facie* good case to put forward which, owing to the negligence of their guardian, was not advanced before the Court. On this point also we have, on the facts, no doubt. The 1st defendant's claim for mesne profits in his possession suit was for Rs. 535 per annum both for past and for future years. (*See* Ex. A.) The Trial Court in that suit decreed past and future mesne profits at Rs. 250 per annum. Now, although the present plaintiffs appealed against the decree, the 1st defendant, the plaintiff in that case, put in no memorandum of cross-objections against the figure decreed and filed no appeal of his own. He was thus apparently quite satisfied with the amount of mesne profits decreed at Rs. 250 per annum for future years; and if the present plaintiff had not appealed, the 1st defendant would have got no more than that figure. It was on the present plaintiff's case in appeal that the mesne profits awarded were too high that the Appellate Court directed the amount to be determined in execution. In execution, as has been noted, the 1st defendant obtained an *ex parte* order for mesne profits at the rate of Rs. 857-8-0 per annum which is a much higher figure than he had even claimed in his possession suit and is more than three times the figure with which he was satisfied when it was awarded him by the decree of the Trial Court. We cannot doubt that, if these facts had been brought before the Judge trying the execution petition, he would have felt bound to regard them as extremely important points to be considered before he arrived at his decision. From these facts alone we are constrained to agree with the Lower Court that the interests of the minors have been gravely prejudiced by the gross negligence of their guardian.

It is argued for the appellants that the actual evidence produced now as to mesne profits is vague and inconclusive and does not amount to proof that the demand of Rs. 857-8-0 is exorbitant and that the Lower Court has not recorded any finding that it was so. But we do not think it necessary to pronounce on the character of the evidence now. What the minors have to establish is that there was a *prima facie* good defence which was not put forward owing to the neglect of their guardian; and the fact that the 1st defendant had not even in his suit estimated the mesne profits at as high a figure as he has now been awarded and that he himself was previously satisfied with the figure of Rs. 250 is in itself a *prima facie* good defence. It is better not to pre-judge the fresh inquiry by a decision now as to whether the figure of Rs. 857-8-0 is

Suryaprakasa Rao v. Sreeramulu.

Wallace, J.

or is not exorbitant. Neither side has evidently put forward its full case yet. In particular, the evidence about the price of paddy for the years in question is defective on both sides. We are, therefore, not prepared to interfere with the decree of the Lower Court so far as the minors are concerned.

The next question is on issues 3 and 5, whether on that finding it should follow that the order in execution has to be set aside against the adult plaintiffs also. In the absence, as we have held, of proof of fraud, they are, of course, *prima facie* bound by the order in execution, as it is *res judicata*. But there are cases in which a Court setting aside a decree or order in part is constrained by the logic of circumstances to set it aside *in toto;* and the necessity for this in certain cases is recognised by the Code of Civil Procedure in O. 9, R. 13 and O. 41, R. 33. Neither of these rules applies directly to the present case as it stood before the Trial Court. But that Court has applied the principles of these rules and set aside the execution order as a whole on the ground that the amount of liability of the adult plaintiffs cannot be separated from, and cannot be different from, that of the minors. The argument seems to us to be a sound one and is based on the principle accepted by this Court in *Valia Panga Achan* v. *Marutha Veera Kavundan*[1] and *Ramalingam Chettiar* v. *Subramania Chettiar*[2] and set out by the Privy Council in *Venkata Row* v. *Tuljaram Row*[3] and by a Bench of the Calcutta High Court in *Jadubansa Narain* v. *Mohunt Hari Charan Bharati*[4]. The original suit for possession and mesne profits was framed against the joint family of the plaintiffs as such. The figure of mesne profits then is the cash value of the annual profit which the joint family might reasonably have made during their possession; and, from that point of view, the amount must be a fixed figure for each member of it. It is impossible for this Court to hold in one and the same proceeding that the amount of profits made by the joint family is both, say, Rs. 250 and Rs. 857 per annum. The joint liability for mesne profits of all the plaintiffs is one and indivisible, and the decree against all the plaintiffs is based on a common ground. Each member of the joint family is entitled to claim that the amount payable by the joint family shall not be more than is payable by every member of it. It is thus impossible to do justice to the minor members of the joint family

1. (1908) I.L.R. 31 M. 454.
2. (1927) I.L.R. 50 M. 614: 52 M.L.J. 612.
3. (1921) L.R. 49 I.A. 91: I.L.R. 45 M. 298: 43 M.L.J. 298 (P.C.).
4. (1907) 6 C.L.J. 226.

unless we re-open the matter of the whole liability of the joint family, that is, of the adult members also. In this view the Lower Court's decree on this point also is correct. We see no reason to interfere and dismiss this appeal with costs of respondents 1 to 5.

The note attached to the decree of the Lower Court will stand as part of the decree. Pleader's fee Rs. 200.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Sree Raja Venkata Rangiah Appa Rao Bahadur and another .. *Appellants** *in all appeals (Plaintiffs in O.S. Nos.* 124, 125 *and* 119 *of* 1924)

v.

The Secretary of State for India in Council represented by the Collector of Kistna and others .. *Respondents in S.A. No.* 317 *of* 1929 (*Defendants* 1 *to* 3 *and* 5 *and L.Rs. of the* 4*th Defendant in O.S. No.* 124 *of* 1924).

Civil Procedure Code (V of 1908), *S.* 80—*Suit by two persons against the Government and other defendants—Notice by one of the plaintiffs—Whether sufficient—Identity of person who issues notice with the person bringing suit, whether necessary—Suit in such circumstances against the defendants other than the Government, whether maintainable—Rejection of the plaint, when S.* 80 *not complied with.*

Two persons brought a suit against the Secretary of State for India in Council as the 1st defendant, and other defendants in possession of the suit lands, for a declaration that the 1st defendant had no right to enfranchise the suit lands and for ejection of the other defendants from the enjoyment of the lands. Notice to the Secretary of State was given by one of the plaintiffs alone.

Held, that if the requisites of S. 80 should be literally complied with, the giving of notice about the suit claim by one of the plaintiffs would not be strict compliance with the mandatory provisions of S. 80, when the suit was filed by two plaintiffs, though one of them happened to be the person that gave the notice.

Bhagchand Dagadusa v. *Secretary of State for India,* (1927) L.R. 54 I.A. 338: I.L.R. 51 B. 725: 53 M.L.J. 81 (P.C.), followed.

There should be identity of the person who issued the notice with the person that brings the suit. In this view, the suit brought by a legal representative of a deceased person and the suit brought by a transferee would offend against S. 80, Civil Procedure Code, if the notice required by that section was given by the deceased man or transferor. Vide *Bachchu*

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*S.A. Nos. 317 to 319 of 1927. 1st September, 1930.

Venkata Rangiah Appa Rao *v.* The Secretary of State for India in Council.

Singh v. *Secretary of State for India,* (1902) I.L.R. 25 All. 187 and *Mahadev* v. *Secretary of State,* (1930) 32 Bom. L.R. 604.

If the claim put forward by the plaintiffs against the 1st defendant failed for want of compliance with S. 80, it could not succeed against the other defendants also.

Bhagchand Dagadusa v. *Secretary of State for India,* (1927) L.R. 54 I.A. 338: I.L.R. 51 B. 725 at 748: 53 M.L.J. 81 (P.C.), referred to.

With regard to the rejection of the plaint as a whole even if it should be taken that clause (*d*) in R. 11 of O. 7, Civil Procedure Code, does not strictly apply to the present cases, the suits are liable to be dismissed on account of non-compliance with S. 80 of the Code.

Raghubans Puri v. *Jyotis Swarupa,* (1907) I.L.R. 29 All. 325, referred to.

Appeal against the decrees of the Court of the Subordinate Judge of Ellore in A.S. Nos. 38, 39 and 40 of 1925 respectively preferred against the orders of the Court of the Additional District Munsif of Ellore, dated the 22nd December, 1924 and made in O.S. Nos. 124, 125 and 119 of 1924 on its file.

A. Venkatarayaliah for appellants.

K. Kameswara Rao for respondents.

The Government Pleader on behalf of the Crown.

The Court delivered the following

JUDGMENT.—These three are connected appeals arising out of three suits brought by the plaintiffs (appellants) against the Secretary of State for India in Council as the 1st defendant and some other defendants in possession of the suit lands, in order to establish the plaintiffs' right to resume the suit inams and for a declaration that the 1st defendant had no right to enfranchise these inams and also for the recovery of possession of these lands ejecting the other defendants therefrom. Both the Courts below have rejected the plaints in these cases under O. 7, R. 11, Civil Procedure Code, on the ground that the notice under section 80, Civil Procedure Code, was not given to the 1st defendant in the manner required by that section. The only question now arising for consideration is, whether the view taken by the Courts below is correct.

The village in which the suit inams are situate belonged to the 1st plaintiff. It is admitted in the plaint that the 1st plaintiff has sold the suit village to the 2nd plaintiff and under the contract of sale the 2nd defendant has been put in possession of the village also. The plaint seeks for a declaration of the right set forth therein in favour of both the plaintiffs and the suit is clearly framed in such a manner as to make it one in which the reliefs mentioned therein are sought for on behalf of both the plaintiffs. Ex. I, which is dated the 22nd of July, 1921, is the notice sent by the 1st plaintiff alone to the Gov-

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ernment under section 80, Civil Procedure Code. The question is, whether the present suit brought by two plaintiffs in the manner above set forth is maintainable when the notice required by section 80, Civil Procedure Code, was given by the 1st plaintiff alone; in other words, whether such a notice can be deemed to be a sufficient compliance with the requisites of section 80. That section lays down that no suit shall be instituted against the Secretary of State for India in Council, unless two months before the institution of that suit a notice in writing was given stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims. There should also be an averment in the plaint that such a notice was delivered or left as stated in the aforesaid section. As regards the provisions in section 80 being strict and mandatory or not, it would appear there was some difference of opinion expressed in some of the rulings relating to this section. In some decisions, a strict view was taken, but, in other cases, a liberal construction was placed upon this section and any defect or irregularity was condoned if it was found to be immaterial or unsubstantial. My attention was drawn to those decisions, but in view of the latest pronouncement by their Lordships of the Privy Council in the case *Bhagchand Dagadusa* v. *Secretary of State for India*[1] it seems to me that the dictum so clearly laid down by the Privy Council will have to be followed in deciding a question of this kind. At page 747, their Lordships have observed thus:

"The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words. Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions."

Later on, their Lordships further state thus:

"To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while section 80 is mere procedure, is fallacious, for section 80 imposes a statutory and unqualified obligation upon the Court."

In view of such a clear pronouncement, it is no longer open to argue that the Courts can make exceptions or qualifications to the explicit terms of section 80 on account of considerations of hardship and absence of prejudice or detriment to the interests of the Government. If the requisites of section 80 should be literally complied with, I must say that the giving of notice about the suit claim by one plaintiff would not be a strict compliance with the mandatory provisions of section 80, when the suit is actually filed by two plaintiffs, though one of them happens to be the person that gave the notice. There should

1 (1927) L.R. 54 I.A. 338: I.L.R. 51 B. 725: 53 M.L.J. 81 (P.C.).

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be identity of the person who issued the notice with the person that brings the suit. In this view, it has been held that a suit brought by a legal representative of a deceased man and a son brought by a transferee would offend against section 80, Civil Procedure Code, if the notice required by that section was given by the deceased man or by the transferor. Vide *Bachchu Singh* v. *The Secretary of State for India in Council*[2] and *Mahadev* v. *Secretary of State.*[3] As the dictum of the Privy Council indicates that it is no longer left to the discretion of the Court to hold in favour of the maintainability of a suit in spite of non-compliance with some of the requisites of the section, I have to find against the maintainability of the present suits on the ground that the notice as required by section 80, Civil Procedure Code, was not given.

It is argued by the learned Advocate for the appellants that even if a strict interpretation of section 80 is made, the plaint, as a whole, should not be rejected, but only so far as the 2nd plaintiff is concerned. If it is a case of rejection of the plaint owing to non-compliance with section 80, it is not clear how there can be a partial rejection of the plaint in respect of a portion of the claim or as regards some of the parties. A similar question was considered by the Allahabad High Court in the case reported in *Raghubans Puri* v. *Jyotis Swarupa*[4]. Referring to section 54 of the old Civil Procedure Code, the learned Judges state that that section only provides for the rejection of a plaint in the event of any matters specified in that section not being complied with and it does not justify the rejection of any particular portion of a plaint. Section 54 now corresponds to O. 7, R. 11, Civil Procedure Code. The plain meaning of that rule seems to be that if any of the defects mentioned therein is found to exist in any case, the plaint shall be rejected as a whole. It does not imply any reservation in the matter of the rejection of the plaint. Non-compliance with the requisites of section 80, Civil Procedure Code, was taken to be a ground covered by clause (*d*) of R. 11 above referred to. Even if it should be taken that that clause does not strictly apply to the present cases; I must hold that the suits are liable to dismissal on account of non-compliance with section 80, Civil Procedure Code.

It is urged on behalf of the appellants that if it should be taken that the suits have to be dismissed, then, so far as the

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2. (1902) I.L.R. 25 A. 187. 3. (1930) 32 Bom. L.R. 604.
4. (1907) I.L.R. 29 A. 325.

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defendants other than the 1st defendant are concerned, the suits may be allowed to be proceeded with. There is real difficulty in acceding to this argument advanced on the appellants' side. If these suits should stand dismissed as against the 1st defendant, it means that the Government's right to resume these inam lands stands unaffected and the plaintiffs have no right as against the Government to resume the same. That being so, their claim to recover possession of these lands from the other defendants should fall to the ground, for the simple reason that they have no right to resume these inams. In this connection I may also refer to an observation made by the Privy Council in the said *Bhagchand Dagadusa* v. *Secretary of State for India*[1]. It was contended in that case, that even if the non-compliance with section 80 defeated the action as against the Secretary of State, it could be proceeded with as against the other defendant. To meet this argument, their Lordships have observed thus:

> "Not only has the suit been throughout a joint proceeding against the officials concerned, for the purpose of getting a joint declaration that the Government Notification was bad as the foundation of everything subsequently done, but, without the presence of the Secretary of State before the Court, the Notification could not be assailed, and, if it stands as valid, the Collector's own action could not be successfully impugned."

Similarly, in the present case, if the claim put forward by the plaintiffs against the 1st defendant fails, it cannot succeed against the other defendants. However, the above observation in that ruling was sought to be distinguished on the ground that in that case there was a necessity of giving notice under section 80 even in respect of the 2nd defendant; and, in the present case, there was no necessity to issue any such notice to the other defendants. But I do not think the observation of their Lordships as to the non-maintainability of the action against the 2nd defendant depended on this circumstance, namely, the necessity of a notice even to the 2nd defendant.

The defect pointed out above being fatal to the maintainability of the suits, either the suits are liable to dismissal or the plaints are liable to rejection. In either view, the order of the Lower Appellate Court seems to be correct. I, therefore, dismiss these second appeals with costs.

K.C. *Appeals dismissed.*

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1. (1927) L.R. 54 I.A. 338: I.L.R. 51 B. 725 at 748: 53 M.L.J. 81 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Seth Bansiram Jashamal through his authorised agent and managing partner Lilaram .. *Petitioner** (*Plaintiff*)

v.

Gunnia Naga Aiyar and others .. *Respondents* (*Defendants*).

Seth Bansiram Jashamal *v.* Gunnia Naga Aiyar.

Transfer of Property Act (IV of 1882), S. 67 (d)—Scope—Suit by co-mortgagee for his share of the mortgage amount—Maintainability—Court-fee payable.

S. 67 (*d*) does not bar a suit by a person interested in part only of the mortgaged property. All that it prohibits is a suit relating only to a corresponding part of the property. He may by all means maintain a suit for the recovery of his share provided the reliefs he prays for, foreclosure or sale, relate to the entire property.

Atchamma v. *Subbarayudu*, (1903) 15 M.L.J. 496 and *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani*, (1919) L.R. 46 I.A. 272: I.L.R. 47 Cal. 175: 37 M.L.J. 483 (P.C.), referred to.

In such a suit, it is sufficient if Court-fee is paid on the plaintiff's share of the mortgage amount.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the finding of the Court of the Subordinate Judge of Madura (Second Additional) in O.S. No. 76 of 1928.

T. L. Venkatarama Aiyar for petitioner.

P. N. Appuswami Aiyar, A. Nagaswami Aiyar, S. Rangaraja Aiyangar, K. V. Sesha Aiyangar, T. R. Ramachandran, V. R. Venugopalan, P. S. Sarangapani Aiyangar and *S. Sankarasubramania Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—This revision petition arises out of an order passed by the Subordinate Judge of Madura directing amendment of the plaint in O.S. No. 76 of 1928 and the payment of additional Court-fee. He passed this order in consequence of his finding on the 3rd issue which was argued as a preliminary issue.

The suit was filed by the plaintiff who was one of several mortgagees in a mortgage document, Ex. A, for Rs. 34,000. The document recites that the consideration of Rs. 34,000 was made up of the sums due on prior separate documents to the mortgagees, namely, the plaintiff and defendants 5 to 10. There is no doubt that the amount of the mortgage money belonged in separate shares to the mortgagees so far as their interests *inter se* are concerned. But the question now is what is the correct

*C.R.P. No. 886 of 1929. 28th March, 1930.

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legal position in a suit against the mortgagor when one of the mortgagees wants to sue. Section 67, clause (*d*) of the Transfer of Property Act enacts:

"Nothing in this section shall be deemed to authorise a person interested in part only of the mortgage money to institute a suit relating only to a corresponding part of the mortgaged property, unless etc."

This section does not prohibit a person interested in part only of the mortgage money instituting a suit to recover his share of the mortgage money only by framing the suit to relate to the whole of the mortgaged property but not to a corresponding part of the mortgaged property. Once the mortgagee frames his suit praying his relief for sale or for foreclosure so as to operate upon the whole of the mortgaged property, instead of a corresponding part of the mortgaged property, the obstacle of this section disappears. In this case the plaintiff has prayed for sale of the whole of the mortgaged properties. The mischief of the prohibition mentioned in section 67 does not operate in the present case.

As to the maintainability of the suit by one only of the mortgagees, whether he sues for his portion of the money or for the whole of the debt, there can be no question. If he sues for his share of the debt only, all that he has to do is to avoid the prohibition in section 67. But if he sues for the whole of the mortgage debt, if he does so with the consent of the other co-mortgagees either because the other co-mortgagees do not claim any share in the mortgage amount and the whole amount from the beginning belonged to the plaintiff or because there is some private arrangement by which the plaintiff has since become entitled to the whole and the co-mortgagee is not entitled to any portion of the debt now, or because the co-mortgagee only has been paid off his share of the debt but the plaintiff has not been paid off his share of the debt—whatever the reason may be—the suit is certainly maintainable. An illustration of this occurs in *Atchamma* v. *Subbarayudu*[1]. In that case the co-mortgagee admitted that he was not entitled to any interest in the mortgage money and the suit was held to be maintainable. The proposition is also clear from the observations of their Lordships of the Privy Council in *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani*[2]. But where there is no consent of the co-mortgagee then the plaintiff must make the co-mortgagee a party defendant and sue for his share of the

1. (1903) 15 M.L.J. 496.
2. (1919) L.R. 46 I.A. 272: I.L.R. 47 C. 175: 37 M.L.J. 483 (P.C.).

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mortgage debt and must take care to see that he is proceeding against the whole of the mortgaged property. This is also clear from the observations of the Privy Council in the case just mentioned. Thus the real question in all such cases is not one of maintainability of the suit but what is the Court-fee to be paid by the plaintiff in such cases and perhaps though the point does not arise now there is also the question of jurisdiction. In such cases, should the plaintiff pay Court-fee upon the whole of the mortgage money or only upon his share? It is true that for realising his share of the mortgage money he has to pray for sale of the whole property. That prayer is already in the plaint in the case before me. Why, therefore, the Subordinate Judge should direct an amendment of the plaint by adding a prayer in respect of the entire mortgagee's interests I do not see. The plaintiff already asked for a sale of the whole of the mortgaged property. If the whole of the mortgaged property realised more than the amount due on the document to all the mortgagees, the plaintiff will be simply paid his amount and the rest of it will be held by the Court and will not be paid to the other co-mortgagees until they pay their Court-fees. The fear that the Government will be deprived of the Government revenue while the whole of the mortgage amount is being realised and only a small amount is being paid as Court-fee, is therefore illusory. After the trial of the case and the final decree is passed, the Court will make a provision directing the defendants-mortgagees to pay their Court-fees within a certain time and if they do not pay the Court-fees the amount will be paid to the mortgagor after taking security. In such a case no mortgagee will allow his money to go back to the mortgagor's hands owing to non-payment of Court-fees, so that ultimately the Government will get the whole Court-fee due upon the whole of the mortgage money. The suit then becomes somewhat analogous to a partition action the plaintiff paying Court-fees only on the share due to him; the other sharers will be arrayed as defendants who will pay Court-fees on the shares due to them and get decrees in respect of their shares on payment of such Court-fees. From this point of view, no doubt, the suit really concerns the whole of the mortgage. I do not see why the plaintiff should be called upon to pay the Court-fees due on the whole of the mortgage amount. Cases are not infrequent in Courts where as incidental to the relief to be given to the plaintiff an issue has to be determined by the Court which may have consequences much wider than the relief which the plaintiff seeks; for instance, an issue as to adoption in a suit

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for rent or money due on a bond or promissory note. In such cases the plaintiff is not asked to pay Court-fees on all the properties which he gets by reason of the adoption. After all, the plaintiff seeks the assistance of the Court to get a certain relief and he pays Court-fees on that relief. The fact that the Court expresses some opinion on a matter of a large value for giving the relief the plaintiff seeks is no reason why the plaintiff should be made to pay a larger Court-fee. In the present case the plaint as framed seems to be correct as already observed. If on sale of the whole of the property the amount realised becomes less than the mortgage amount due on the document, all the mortgagees must suffer rateable diminution of course subject to questions of priority raised by the plaintiff, as to which I say nothing now. Apart from such questions of priority rateable diminution seems to be necessary and the plaintiff will get the amount due to him after calculating the proportionate amount.

It is suggested to me by the respondents that there may be further questions arising in the case after the sale of the mortgaged properties such as (1) personal decree against the mortgagor and his other properties if the sale proceeds are not sufficient to pay the mortgage amount, (2) the right of the mortgagees to proceed against the surety who is the 11th defendant in the suit, and (3) any such other points that might possibly arise. It is said there is some compromise between the plaintiff and respondents 7 to 10. The whole suit may be tried subject to such terms, whatever they are. If the case proceeds on the footing that the plaintiff and the defendant co-mortgagees all stand somewhat in the position of plaintiffs as in a partition suit, there is no objection to working out the personal decree and even the rights against the sureties in this very suit even assuming for a moment that the plaintiff does not care to prosecute those remedies or compromised the matter with the sureties or with the mortgagors. With this understanding the suit can be allowed to proceed without any need for further amendment remembering that the whole of the property sought to be sold is really the entire mortgagee's interests which is after all the point which the Subordinate Judge seems to be particular about. With these observations I hold that no amendment of the plaint is necessary and direct that the suit be permitted to proceed as it is. I make no order as to costs.

S.R. *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE ANANTAKRISHNA AIYAR AND MR. JUSTICE CURGENVEN.

Abdul Sac *alias* Varusai Mohammad Sahib .. *Appellant**
(Petitioner—2nd Defendant).

v.

Sundara Mudaliar and another .. *Respondents*
(Respondents—Plaintiff and 6th Defendant).

F. B.

Abdul Sac *v.* Sundara Mudaliar.

Civil Procedure Code (V of 1908), S. 47 and O. 1, R. 10 (2)—Parties to suit—Defendants exonerated on ground of misjoinder—Whether continue as parties—Duty of executing Court to consider judgment and pleadings—Persons shown to have been improperly impleaded—Proper procedure.

Where certain defendants are held to have been improperly impleaded as parties to a suit and the suit is on that ground dismissed against them, they are not defendants against whom a suit has been dismissed as is provided by S. 47, Civil Procedure Code. In such a case it is proper for the executing Court to consider not only the decree but also the judgment and the pleadings and see whether upon the facts of the case the parties, although the suit was dismissed against them, really remained parties to the suit.

Distinction between the case of dismissal of a suit because of the plaintiff abandoning his claim against the defendant and the case of a dismissal on account of misjoinder of parties pointed out.

Krishnappa v. *Periaswami,* (1916) I.L.R. 40 M. 964: 32 M.L.J. 532, approved.

It is the duty of a Trial Judge to strike out the name of a party improperly impleaded. It is quite a wrong procedure to dismiss the suit against him.

Appeal against the order of the District Court of Madura, dated 20th day of March, 1928 and made in A.S. No. 208 of 1927, preferred against the order of the Court of the District Munsif of Madura Taluk at Madura, dated 10th October, 1927 and made in M.P. No. 280 of 1927 in O.S. No. 348 of 1917, 2nd Additional District Munsif's Court, Madura.

T. L. Venkatarama Aiyar for appellant.

S. T. Srinivasagopalachari for respondents.

The Court delivered the following

Beasley, C. J.

JUDGMENTS. *The Chief Justice.*—This case has been referred to us by our brother Jackson, J., because the question for

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*A.A.A.O. No. 102 of 1928. 24th April, 1930.

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decision by us has been the subject of conflicting decisions in *Krishnappa* v. *Periaswami*[1] and *Sethu Konar* v. *Ramaswami Konar.*[2]

The question before us arises out of proceedings in execution. The 2nd defendant in Original Suit No. 348 of 1917 on the file of the 2nd Additional District Munsif's Court of Madura is the appellant here. The facts of the case may be briefly stated as follows. One Kaliappa Pillai was the original owner of the properties, the subject-matter of the suit. He left a widow and an adopted son Ramaswami Pillai. In 1889 the latter released the suit properties in favour of his adoptive mother. She sold the property in 1894 and between that date and 1909 there were different purchasers. In 1909 the appellant became the purchaser of the property and created a usufructuary mortgage in 1910 in favour of the 6th defendant. In 1906 Ramaswami Pillai executed a mortgage of some of the properties which mortgage was assigned to the present 1st respondent. In 1917 the 1st respondent filed a suit to enforce the mortgage and bring the properties to sale. Ramaswami's son was the 1st defendant and defendants 2 to 5 were impleaded in that suit and also the 6th defendant the usufructuary mortgagee. In that suit the 1st defendant was *ex parte*. The 2nd defendant claimed a title paramount by purchase and pleaded that he was not a necessary party to the suit. The District Munsif dismissed the suit as against defendants 2 to 6 but gave a decree against the 1st defendant. In the judgment he states as follows:—

"2nd defendant claims an independent title. He has endorsed on the plaint that he does not derive his title from the mortgagor but quite independently of him. Therefore, he is not a necessary party to the suit. The suit must be therefore dismissed with costs against defendants 2 to 6. Plaintiffs will get a decree against the other defendants in the suit."

In the decree also the suit was dismissed as against defendants 2 to 6. An execution petition was then presented by the plaintiff to bring the property to sale. No notice was given to the other defendants. He dispossessed the 6th defendant who was then in possession of the property. The appellant then presented an application to put the 6th defendant in possession of the property. The 1st respondent disputed the appellant's title on the merits and put him to proof of all the sales and purchases. The District Munsif held that the plaintiff (1st res-

1. (1916) I.L.R. 40 M. 964: 32 M.L.J. 532.
2. (1925) I.L.R. 49 M. 494: 50 M.L.J. 205.

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pondent) was not entitled to evict the defendants. In his order the District Munsif stated:

"The plaintiff is not entitled in execution of this decree to evict the 6th defendant or defendants 2 to 5."

The 1st respondent appealed to the District Judge at Madura, who held that the question of title as between the 1st respondent and defendants 2 to 6 should have been investigated and that since the defendants 2 to 6 were parties to the suit, the 1st respondent was barred by section 47, Civil Procedure Code, from instituting a separate suit, but that the application under section 47 of the Civil Procedure Code could have been treated as a suit if the learned District Munsif considered it sufficiently complicated. The appellant's contention here is that the question of his title and the 6th defendant's title was not a matter which could be gone into in the execution proceedings.

The question is whether defendants 2 to 6 in the suit are, under the provisions of section 47 of the Civil Procedure Code, defendants against whom a suit has been dismissed and therefore parties to the suit. The contention of the appellant is that as the defendants were held not to have been properly impleaded in the suit and the suit on that ground was dismissed as against them, they are not defendants against whom a suit has been dismissed as is provided in section 47 of the Civil Procedure Code and that there is a distinction between the dismissal of a suit on its merits and a dismissal through misjoinder of parties. Two views upon this matter have been taken. There is the broad view of the section taken in *Krishnappa* v. *Periaswami*[1] and the narrow view of it in *Sethu Konar* v. *Ramaswami Konar*[2]. Before proceeding to deal with the cases upon this point, reference must be made to O. 1, R. 10 (2), Schedule I of the Civil Procedure Code which provides that the Court may at any stage of the proceedings order the name of any party improperly joined to be struck out. The District Munsif having found that defendants 2 to 6 had been improperly impleaded in the suit should have ordered their names to be struck out instead of dismissing the suit as against them. The broad view of section 47 of the Civil Procedure Code is that it is proper for the Court in execution proceedings to consider not only the decree itself but the judgment and the pleadings and see whether upon the facts of the case the parties, although the suit was dismissed as against them, really remained parties to the suit. The narrow view of the section is that

1. (1916) I.L.R. 40 M. 964: 32 M.L.J. 532.
2. (1925) I.L.R. 49 M. 494: 50 M.L.J. 205.

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it is not appropriate to the executing Court to consider anything else but the fact that the suit was dismissed as against the defendants—no matter what the reasons were for such dismissal. That of course is placing the strictest and narrowest construction on section 47.

In *Krishnappa* v. *Periaswami*[1] Ayling and Kumaraswami Sastri, JJ., held that where a party to a mortgage suit, who sets up a title adverse to both the mortgagor and the mortgagee, has been exonerated from the suit on the ground of misjoinder and his claim has not been adjudicated upon in the suit, he does not remain a party to the suit for the purposes of section 47 of the Civil Procedure Code. The order of the Judge in the trial Court was an order exonerating the defendant with costs as he was an unnecessary party to the suit. It was argued in the appeal that notwithstanding this exoneration, he still continued to be a party to the suit and that the Lower Appellate Court should have gone into the question of his title. On page 966 in the judgment of the High Court it is stated:

"The exoneration in the present case having been on the ground of misjoinder we are of opinion that the party whose claim was not adjudicated upon does not remain a party to the suit for the purpose of section 47 of the Code of Civil Procedure. Exoneration from the suit may be due to various causes and the question whether a party remains on record for the purpose of section 47 in spite of such exoneration will depend upon the nature and scope of the order having regard to the pleadings and the reason which led to such dismissal or exoneration. To hold that in cases of misjoinder (and consequent refusal of the Court to adjudicate upon the particular matters in contest) the party whose claim was not adjudicated upon and who was exonerated remains a party to the suit would lead to the anomaly that the Court would be bound in execution proceedings to decide the very questions which it refused to determine in the suit."

And again at page 968:

"As pointed out in *Venkatapathi Naidu* v. *Subraya Mudali*[3] the mere fact that the name of the exonerated party is not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remains a party."

The case was referred to in *Sannamma* v. *Radhabhayi*[4], a decision of the Full Bench which held that where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant, such a person is a defendant against whom a suit has been dismissed within section 47, Civil Procedure Code.

1. (1916) I.L.R. 40 M. 964: 32 M.L.J. 532.
3. (1907) 17 M.L.J. 416.
4. (1917) I.L.R. 41 M. 418: 34 M.L.J. 17 (F.B.).

F. B.

Abdul Sac v. Sundara Mudaliar.

Beasley, C. J.

On page 424, Sir John Wallis, C.J., states:

"The case which came before the Court in *Krishnappa* v. *Periaswami*[1] of a misjoinder of causes of action and of the plaintiff being required to proceed with one cause of action only and the suit being dismissed as against the defendants who had been joined in respect of the other cause of action only, may possibly stand on a different footing, as to hold that the cause of action which the Court was prohibited from trying may be gone into in execution by virtue of section 47, goes far to defeat the prohibition of joinder, and such a construction of section 47 should, therefore, be avoided if it is possible to do so. As that question is not before us, I express no opinion upon it, and will only say that the proper course in these cases appears to be for the Court to exercise the power, which it now has under O. 1, R. 10 (2), of ordering at any stage of the proceedings, the name of a defendant improperly joined to be struck out, instead of dismissing the suit as against him. That will, as held by the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma*,[5] have the effect of taking him out of the operation of section 47 which ought not to apply to him, seeing that he has no real concern with the suit."

Although Sir John Wallis does not definitely decide the point, it is obvious that he approved of the spirit of *Krishnappa* v. *Periaswami*[1] and he certainly has given very strong reasons for holding that the Bench in that case took the correct view.

I will now turn to *Sethu Konar* v. *Ramaswami Konar*[2] where a Bench of this Court took the opposite view to that taken in *Krishnappa* v. *Periaswami*[1]. That was a suit for sale on a mortgage and a person claimed the property by a title paramount to that of the mortgagor and he was joined as a defendant. But the final decree merely stated that he was exonerated without removing his name from the record and it was held that he should be considered as continuing to be a party to the suit. The reason for deciding this case in that way was that the Bench considered that the ground on which a party is exonerated from the suit can never determine whether he continues or ceases to be a party but will depend entirely upon whether his name has been struck off from or retained on the record. This of course is applying section 47 in its strictest sense.

Another case on this point is *Linga Aiyar* v. *Lakshmanan Chettiar*,[6] a decision of Odgers and Viswanatha Sastri, JJ. The 2nd defendant in that suit had his name by consent struck off by the District Munsif but his name was retained in the cause title in the decree which was finally drawn up and it was held that in spite of his name being struck off, he was a party to the suit within the meaning of section 47 and the explanation there-

1. (1916) I.L.R. 40 M. 964: 32 M.L.J. 532.
2. (1925) I.L.R. 49 M. 494: 50 M.L.J. 205.
5. (1900) I.L.R. 23 M. 361: 10 M.L.J. 126 (F.B.).
6. (1925) 50 M.L.J. 387.

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to, but it was stated that striking out is the proper procedure to be employed in the case of misjoinder, that in any other case the proper course is dismissal and that striking off of the name is not appropriate to a case of a party against whom the plaintiff does not wish to proceed further. In that case there was no question of a misjoinder of parties as the defendant was properly impleaded in the suit. Another case directly in point is *U Kala* v. *Ma Hnin U*[7] and there *Krishnappa* v. *Periaswami*[1] and *Sannamma* v. *Radhabhayi*[4] were followed; and it was held that where a suit is dismissed against a person on the ground that he was wrongly joined as a party having no real concern with the suit, such a person does not remain a party to the suit for the purpose of section 47 of the Civil Procedure Code and that a more appropriate way, in case of misjoinder, is to strike out the name of the party under O. 1, R. 10 (2) of the Code so as to take him out of the operation of section 47.

The contrary view was taken in *Abdul Kasim* v. *Thambusami Pillai*[8]. There a defendant was exonerated by the decree in the suit with the result that the suit was dismissed as against him but his name was not actually removed from the record and it was held that he did not cease to be a party to the suit on that account. That was a decision of a Bench consisting of Oldfield and Krishnan, JJ. This case was referred to in *Krishnappa* v. *Periaswami*[1]. No reason for the exoneration of the defendant is given either in the statement of the facts of the case or in the judgment which is a very short one. In *Venkataswami* v. *Chidambaram*[9] it was held that a defendant whose name appears in the decree without having been struck off previously from the record is a party within the provisions of section 47 of the Civil Procedure Code. There the 4th defendant set up a title adverse to both the mortgagor and the mortgagee and was held not to be a necessary party and ordered to be struck out of the suit. The order was:

"4th defendant is not a necessary party and is exonerated with costs."

The Bench consisting of Sadasiva Aiyar and Phillips, JJ., thought that section 47 was perfectly plain in its terms. In *Ramaswami Sastrulu* v. *Kameswaramma*[5] it was held that a party defendant exonerated from the suit, the suit being dismissed against him, is a party to the suit. This case also was referred to in *Krishnappa* v. *Periaswami*[1] but was held distin-

1. (1916) I.L.R. 40 M. 964: 32 M.L.J. 532.
4. (1917) I.L.R. 41 M. 418: 34 M.L.J. 17 (F.B.).
5. (1900) I.L.R. 23 M. 361: 10 M.L.J. 126 (F.B.).
7. (1927) I.L.R. 5 Rang. 110.
8. (1916) 5 L.W. 701.
9. (1917) 23 M.L.T. 206.

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guishable because it did not appear to be a case of exoneration of a party by reason of misjoinder of causes of action.

Mr. Srinivasagopalachari in the course of his argument on behalf of the respondent contended that the construction placed upon section 47 of the Civil Procedure Code in *Krishnappa* v. *Periaswami*[1] ought not to be placed upon it because of the inconvenience it would cause to the litigant public and those who have to advise them and because it would put an unreasonable burden upon the executing Court if that Court had to consider not only the decree but the judgment and the pleadings in the suit instead of merely taking the decree itself. I can see no force in this latter contention as it is the duty of a Court not only to refer to the decree but also the judgment and the pleadings. In the case before us no inconvenience could have been occasioned by this procedure because the judgment of the District Munsif upon this point is contained in a very few lines. He further contended that there can be no distinction between the case of a defendant against whom the plaintiff abandons his claim and the suit is accordingly dismissed as against him and a person who has the suit dismissed against him on account of misjoinder. In my view, the two cases are quite different. In the former case he may be a proper party to the suit but yet the plaintiff either does not wish to take a decree against him or feels that he is unable to prove his claim and he is not a person to whom O. 1, R. 10 (2) applies. In the latter case, on the other hand, he is a person who ought never to have been made a party to the suit at all and not having been properly impleaded, the plain duty of the Court is to strike his name out. If the respondent's contention is correct, then it means that, although the appellant ought not to have been made a party to the suit and the District Munsif held that he had been improperly impleaded and instead of striking his name out adopted the wrong procedure in dismissing the suit as against him, he is to be placed in a worse position than a party in respect of whom the Court does adopt the correct procedure. It seems to me to be a contradiction to say that a person who is held at the trial of the suit not to be a proper party to the suit remains still a party to the suit. I am clearly of the opinion that *Krishnappa* v. *Periaswami*[1] was correctly decided and the appeal to the Lower Appellate Court was incompetent. The appeal must accordingly be allowed with costs.

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1. (1916) I.L.R. 40 M. 964: 32 M.L.J. 532.

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I cannot leave this case without pointing out that it is the duty of the Trial Judge to strike out the name of a party improperly impleaded. It is quite a wrong procedure to dismiss the suit as against him.

Anantakrishna Aiyar, J.—I agree.

Curgenven, J.—I agree.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE ANANTAKRISHNA AIYAR.

In re Kolanda Nayakkan ... (*Prisoner*), *Appellant.**

Kolanda
Nayakkan,
In re.

Penal Code (XLV of 1860), *S.* 302—*Sentence—Age of accused—Murder not wholly deliberate or cold-blooded—Offence committed under recent provocation—Lesser sentence of transportation for life.*

Beyond the provisions of Ss. 82 and 83, the Penal Code does not say anything about there being any age-limit for the capital sentence. In cases where the murder has been deliberately planned and is of a cold-blooded nature, whatever the age of the accused, provided his case does not come under S. 22, Madras Children Act, 1920, the death sentence will be the appropriate one. But where the murder cannot be said to be wholly deliberate or cold-blooded, and is shown to be the result of recent provocation, which in an immature mind might assume exaggerated importance, the lesser sentence of transportation for life and not the capital sentence may be the more appropriate one.

Trial referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the appellant in Case No. 4 of the Calendar for 1930.

V. L. Ethiraj and *N. Somasundaram* for appellant.

The Public Prosecutor (*L. H. Bewes*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The accused has been convicted by the learned Sessions Judge of Coimbatore of the offence of murder and sentenced to death.

The charge against him was that at about 11 o'clock on the 20th of October last he stabbed one Abdul Muthu in the streets of Tiruppur and inflicted upon him seven incised wounds three of which were fatal. The man after running for some distance collapsed and died practically on the spot. The eye-witnesses to the attack are P.Ws. 2, 3, 4, 5 and 12. That it was the accused who so attacked the deceased has not been seriously disputed by the learned counsel for the accused, although he would suggest that the series of blows occurred in quicker succession than the eye-witnesses would say, and perhaps it

*Ref. Trial No. 38 of 1930. 8th April, 1930.
Cr. Appeal No. 134 of 1930.

may be allowed that on the medical evidence it is a little difficult to imagine how the deceased was able to run about 180 yards after receiving the blows which the medical certificate describes, and it may be that the attack was something more rapid and not quite so deliberate as the eye-witnesses would make out. The offence *prima facie* is clearly murder. There can be no doubt that the person who inflicted with a knife such fatal wounds on the deceased certainly intended nothing short of inflicting death. We cannot find any extenuating circumstance which would bring the offence to anything less than murder. There is no question of self-defence raised, nor is there any such case appearing in the prosecution evidence. It has been suggested that the accused had a certain amount of provocation, but the only provocation that has been spoken to by prosecution witnesses occurred a couple of hours earlier than the offence and cannot, therefore, easily be described as grave and sudden. The only defence put forward by the accused is that the case is a false one and has been got up by his enemies. But there is really no motive elicited why the eye-witnesses should lend themselves to a false case against the accused. There can be no doubt that the learned Sessions Judge is correct in convicting the accused of the offence of murder, and the only question which remains is whether the capital sentence in the circumstances was an appropriate one.

The accused is stated to be aged about 15. Both the committing Court and the Sessions Judge say that he looks more, that he looks about 18; so far as the records show, it may be taken that he is about 15 years of age, but his age has not been definitely determined. A plea has been put forward that in the case of a youth the capital sentence is inappropriate. To the proposition put thus broadly we cannot assent. Beyond the provisions of sections 82 and 83, the Penal Code does not say anything about there being any age-limit for the capital sentence; and, in cases where the murder has been deliberately planned and is essentially of a cold-blooded and contemptible nature, we think that usually, whatever the age of the accused might be, provided his case does not come under section 22, Madras Children Act (IV of 1920), the death sentence would be the appropriate one. This Court has, for example, in cases where the accused had been convicted of decoying away children and cutting their throats, or drowning them, or putting them away, in order to possess themselves of a few rupees worth of jewels, held that, in spite of the murderer being a youth (about 18 years old), the capital sentence would be the

only appropriate sentence. But where the murder cannot be said to be wholly deliberate and cold-blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance, we think that the capital sentence might in certain cases not be the appropriate one. In the present case, apart from the question whether the accused is entitled to the benefit of the provisions of section 22 of the Madras Children Act, we have evidence that within about a couple of hours before the occurrence the accused and the deceased had been quarrelling, and that the deceased, who is described by the prosecution witnesses themselves as a bully and the terror of the village, had assaulted this boy and had given him several blows; about two hours later the accused retaliated by stabbing the deceased in the manner described. There is, therefore, in the present case this amount of recent provocation which justifies us in describing the murder as not deliberately cold-blooded and inherently vicious. In these circumstances we think that the adequate sentence will be the lesser sentence of transportation for life.

Kolanda Nayakkan, *In re.*

We therefore reduce the capital sentence to one of transportation for life.

B.V.V. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Nappalli Kandiyilthamasikkum Puthiyottil Kanhiratan Govinda Kurup .. *Appellant** *(Plaintiff)*

v.

Chowakkaran Keloth Beekku *alias* Beekutti Umma (dead) and others ... *Respondents* *(Defendants Nos. 1 to 4 and 15).*

Govinda Kurup *v.* Chowakkaran Keloth Beekku.

Transfer of Property Act (IV of 1882), Ss. 7 and 105—Lease by minor—Validity.

A lease by a minor is void. That it was only executed by the lessee in favour of the minor lessor and not by the lessor does not cure its invalidity. A lease is essentially a bilateral contract.

Mohori Bibee v. *Dhurmodas Ghose,* (1902) L.R. 30 I.A. 114: I.L.R. 30 Cal. 539 (P.C.), relied on.

Syed Ajam Sahib v. *Ananthanarayana Aiyar,* (1910) I.L.R. 35 Mad. 95: 21 M.L.J. 202 (F.B.), referred to.

Raghavachariar v. *Srinivasaraghavachariar,* (1916) I.L.R. 40 Mad. 308: 31 M.L.J. 575 (F.B.), distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A.S. No. 382 of 1925 (A.S.

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*S.A. No. 1947 of 1926. 2nd September, 1930.

Govinda Kurup v. Chowakkaran Keloth Beekku.

No. 551 of 1924, District Court of North Malabar) preferred against the decree of the Court of the Principal District Munsif of Tellicherry in O.S. No. 475 of 1923.

C. S. Venkatachariar and *V. P. Karunakaran Nambiar* for appellant.

K. Kuttikrishna Menon and *A. Atchuthan Nambiar* for respondents.

The Court delivered the following

JUDGMENT.—Plaintiff is the appellant. On the strength of a lease of immoveable property (lands) granted to him by defendants 1 and 2 by means of the registered Marapat, dated 28th December, 1919 (the original of Ex. B), which was executed by the plaintiff to defendants 1 and 2, he filed the present suit to recover possession of those lands from defendants 3 and 4, who are in occupation thereof, as lessees under the tarwad of 1st defendant, under a renewed lease granted by the 14th defendant as Karnavan on 13th January, 1920, as per Ex. I. Both the Lower Courts have held that the plaintiff has not acquired a valid right to the suit property under the lease set up by him and dismissed his suit.

The 1st defendant belongs to a rich Moplah tarwad. In 1918 and 1919, the then Karnavan, Makki Keyi allotted some properties of the tarwad for the maintenance of 1st defendant (a minor) under the deeds Exs. III and IV. The suit lands are comprised in Ex. IV. There is no doubt that when the melcharth was given to the plaintiff as per Ex. B, dated 28th December, 1919, the 1st defendant who was a minor, was the sole owner thereof. The 2nd defendant is her husband. The Marupat or the lease deed (Ex. B) was executed by the plaintiff (lessee) to defendants 1 and 2, but the 2nd defendant had no right or interest in the suit property, and was not therefore competent to grant a lease of the same. The custom alleged by the plaintiff, whereby the husband of a Moplah woman has the right to manage the properties given to her for maintenance, in order to make out the validity of the lease in question, treating it as one granted by the husband (2nd defendant), has been found by the Lower Appellate Court to be unproved. I accept that finding as correct. The question therefore has to be decided on the footing that the lease in question was granted to the plaintiff by the 1st defendant (the owner of the suit property) when she was a minor. Is such a lease valid and enforceable?

A lease of immoveable property, as defined in section 105 of the Transfer of Property Act, is a transfer of a right to

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enjoy such property, made for a certain time or in perpetuity, in consideration of payment of rent in cash or kind. A lease is necessarily a transfer of an interest in immoveable property by the lessor in favour of the lessee. A minor is not competent to contract, and, under section 7 of the Transfer of Property Act, it is only a person competent to contract and entitled to transferable property, that can transfer such property, either wholly or in part to another person. Any transfer of such an interest by the 1st defendant (a minor) by the transaction of lease relied on by the plaintiff would, therefore, be void. A sale is a transfer of ownership in immoveable property, in exchange for a price. A mortgage is the transfer of an interest in immoveable property, in consideration of a loan, for securing the repayment of it. There is no doubt that a sale by a minor, and a mortgage by a minor, are invalid, and unenforceable. In *Mahori Bibee* v. *Dhurmodas Ghose*[1] their Lordships of the Privy Council have held, that not only is a mortgage made by a minor void, but even on a decree being given declaring the mortgage invalid, the lender was not entitled to the repayment of the money advanced to the minor under that invalid mortgage. It is not conceivable how a lease by a minor can be valid, while a sale or a mortgage by a minor is void, if regard be had to the fact that just as in the case of sale or mortgage, there is a transfer of an interest in immoveable property, namely, the right to enjoy such property in a lease by the lessor to the lessee.

Mr. C. S. Venkatachariar for the appellant made a strenuous endeavour to differentiate a lease by a minor, from a sale or a mortgage by a minor, inasmuch as the Marupat of the lease deed (Ex. B) was executed not by the minor (1st defendant) but by the plaintiff (lessee) to the 1st defendant (lessor). It is true that in the case of a sale or a mortgage, the deed should be executed by the seller, or the mortgagor. But in the case of a lease section 107 of the Transfer of Property Act does not expressly state by whom the registered instrument should be executed, the lessor, or the lessee, or both. It has been held by a Full Bench of this High Court in *Syed Ajam Sahib* v. *Ananthanarayana Aiyar*[2] that the registered instrument referred to in that section need not necessarily be an instrument signed by the lessor, and such a lease may be created by a registered instrument signed by the lessee and accepted by

1. (1902) L.R. 30 I.A. 114: I.L.R. 30 C. 539 (P.C.).
2. (1910) I.L.R. 35 M. 95: 21 M.L.J. 202 (F.B.).

Govinda Kurup v. Chowakkaran Keloth Beekku.

the lessor. The fundamental conception of a lease involves the transfer of an interest in immoveable property by the lessor to the lessee, and if a valid lease can be created even by a registered instrument signed by the lessee and accepted by the lessor, it must be deemed to have effected a transfer of an interest in immoveable property by the lessor to the lessee. If by reason of the lessor's minority, he is incompetent to make the transfer at all, the fact that the instrument is not signed or executed by him, but only to him cannot make any difference. By necessary implication, it amounts to a transfer by the lessor (in this case, a minor) and if it should be contended, that because Ex. B is not signed or executed by the 1st defendant, there was no transfer by the minor, it would follow, that there was no lease at all. It seems to me clear that the invalidity of the lease in question by reason of the minority of the lessor cannot be got over by the circumstance that the instrument Ex. B was executed to her, and not by her. A lease is essentially a bilateral contract. On the part of the lessor, there must be a transfer of an interest in immoveable property by him and on the part of the lessee, there must be a promise to pay the rent. These are reciprocal considerations. In the present case, the lease deed Ex. B though executed by the lessee (plaintiff) expressly recites "you have hereby demised to me the said two items of property". It means, that under this deed executed by me and accepted by you, you have transferred the right to enjoy the two items to me. Such a transfer by a minor, who is incompetent to make the transfer, is now sought to be enforced by the plaintiff as the basis of his claim to recover possession of the properties from defendants 3 and 4. This case has, in my opinion, no close analogy to a case of a sale in favour of a minor who has already paid the price, or a mortgage in favour of a minor who has already advanced the loan. The Full Bench decision in *Raghavachariar* v. *Srinivasaraghavachariar*[3] deals with such a mortgage in favour of a minor. The observations in the judgment of the learned Chief Justice in that case seem to be quite in consonance with the contention of the respondents in respect of the lease in question. There is a very elaborate discussion in the judgment of Srinivasa Aiyangar, J., in that case, and reference was made to several passages in that judgment by the learned Advocate for the appellant. After a careful consideration, I am unable to find any definite pronouncement in that judgment for holding that the lease in the present

3. (1916) I.L.R. 40 M. 308: 31 M.L.J. 575 (F.B.).

case relied on by the plaintiff is valid and enforceable. I agree with the Lower Appellate Court's view on this point.

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The dismissal of the plaintiff's suit is therefore correct, and this second appeal is dismissed with costs.

S.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

K. Ramaraja Tevan and others .. *Prisoners** (*Accused*).

Ramaraja Tevan, *In re.*

Indian Penal Code (XLV of 1860), Ss. 143, 144 and 149—Criminal Procedure Code, Ss. 233 and 235—Persons assembled with the common object of shooting and looting—Whether members of an unlawful assembly—Whether the various acts of which the accused were found guilty formed one transaction—Preparation whether punishable.

Twenty to thirty persons armed with guns and sticks came with the common object of shooting one *S* and looting his house. There ensued a stampede in which one of the persons was shot through and another was mortally wounded and died subsequently of it. The accused were all found guilty of being members of an unlawful assembly under S. 143 of the Indian Penal Code and those that fired being armed as they were with deadly weapons were found guilty under S. 149 and accordingly two were convicted of murder and one for attempt at murder.

Held, (1) that since the accused formed themselves into a body with the intention of looting and shooting one *S* and frightening away any one who tried to prevent them, the whole affair from the formation to the disruption of this assembly seemed obviously to be one transaction and hence there was no misjoinder in contravention of S. 233 of the Criminal Procedure Code;

(2) that after people had formed themselves into an unlawful assembly and decided upon their common object, preparation towards that common object was prosecution or following up and if the preparation happened to be an offence, then they were equally liable.

Unless the impugned procedure was one that was not only prohibited by the Code but also worked actual injustice to the accused, it could not be said that there had been a failure of justice.

Abdul Rahman v. *King-Emperor,* (1926) L.R. 54 I.A. 96: I.L.R. 5 R. 53: 52 M.L.J. 585 (P.C.), followed.

Trial referred by the Court of Session of the Ramnad Division at Madura for confirmation of the sentence of death passed upon the 1st and 3rd accused and appeal by accused 1 to 16 against their conviction and sentence by the same Court in Sessions Cases Nos. 42 and 49 of 1929.

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*Ref. Trial No. 155 of 1929. 11th February, 1930.
Cr. Appeal No. 556 of 1929.

Ramaraji Tevan, *In re.*

Nugent Grant and *U. Somasundaram* for accused.

The Public Prosecutor (*L. H. Bewes*) for the Crown.

The Court delivered the following

JUDGMENT.—The sixteen appellants do not dispute the Lower Court's findings of fact.

On 11th April, 1929, at Khansapuram, 20 to 30 persons came from the north armed with guns and sticks with the common object of shooting Sangiah Tevan and looting his house. When they were 50 yards off the house, one Sundara Tevan, P.W. 10, tried to dissuade them, and Krishna Tevan, P.W. 11, who belongs to Sangiah's faction, abused them. Krishna Tevan was hit on the head by accused 13, and then two more of the opposite faction, Alagu and Sangiah, ran up. The 1st appellant shot Alagu, and the third shot Sangiah. Then the fourth fired into seven persons who came to help them, after which there was a general stampede. Alagu was shot through his heart and died immediately. Sangiah had his leg broken and died of gangrene on the 14th.

The learned Judge has found that the shooting and the assault upon Krishnan were the sudden outbreaks of individual members of the assembly, and therefore presumably were not in prosecution of its common object. Accordingly he has acquitted all the appellants of rioting. But he has found them all guilty of being members of an unlawful assembly under section 143, Indian Penal Code, and inasmuch as the men who fired (appellants 1, 3 and 4) undoubtedly had guns, he has found all guilty, either directly, or constructively by the provision of section 149, of being armed with deadly weapons while being members of an unlawful assembly, the offence under section 144, Indian Penal Code.

Accused 1 and 3 are found guilty of murder, section 302, Indian Penal Code, and accused 4 guilty of attempted murder, section 307, Indian Penal Code.

Accused 13 is found guilty under section 323. It is argued by Mr. Nugent Grant that none of those convictions can stand because the two murders, the attempted murder and the hurt were several and independent transactions which had no real connexion with the unlawful assembly. For every distinct offence of which any person is accused there must be a separate charge (section 233), unless they are so connected together as

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to form the same transaction (section 235), and the misjoinder of charges in this case has in fact occasioned a failure of justice.

To this plea there would seem to be three sound answers. In the first place it cannot be said that there has been a failure of justice. Supposing that the murders and assaults were quite unconnected with the object of the unlawful assembly, a Court which had joined them all together in one trial might well have been led to attribute to the assembly force and violence of which it was entirely innocent, and so might have found it guilty of rioting; and had this one terminated in a conviction of rioting it would be impossible to say that the irrelevant consideration of the extraneous offences had not influenced the mind of the Court. But the charge of rioting was dismissed, and it must be said that the mind of the Court, though dangerously exposed to infection, proved absolutely immune.

No doubt ever since the pronouncement of the Judicial Committee in *N. A. Subramania Aiyar* v. *King-Emperor*[1], it has been the general practice to assume that, if a mandatory provision of the Code has been infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. Section 537 affords no real ground for any such assumption, and the Judicial Committee itself, when it had occasion to refer to *N. A. Subramania Aiyar* v. *King-Emperor*[1] in *Abdul Rahman* v. *King-Emperor*[2], clearly indicated that the impugned procedure must be one that is not only prohibited by the Code, but also works actual injustice to the accused. In the latter case the Code was clearly infringed, but the curative provision of section 537 was considered a sufficient remedy.

In the second place, whatever conclusion was finally arrived at by the learned Judge, it is clear that before the evidence was heard it must have been a very open question whether the shooting was or was not in prosecution of the common object. It is a question of degree. If the men who protested had been ranged on the doorstep of Sangiah's house, it would be hard to say that shooting them was not in prosecution of the looting. What if they were five, ten, fifty yards away? It is a matter that could only be decided after a most careful consideration of the evidence as a whole; and it cannot be said that to have accused these persons of shooting in prosecution of the common object was in any way

1. (1901) L.R. 28 I.A. 257: I.L.R. 25 M. 61: 11 M.L.J. 233 (P.C.).
2. (1926) L.R. 54 I.A. 96: I.L.R. 5 R. 53: 52 M.L.J. 585 (P.C.).

Ramaraja Tevan, *In re.*

frivolous. If the charge could be postponed till after the conviction, a more perfect symmetry might be attained, but unfortunately that cannot be; and the charge of necessity must be founded upon the accusation (cf. *Abdul Salim* v. *Emperor*[3]). It cannot be said therefore that there has been any misjoinder in contravention of section 233, Criminal Procedure Code.

In the third place, even supposing that the ultimate finding governs the charge, so that the Court was precluded from charging as though the shooting had been in prosecution of the common object, still it cannot be said that the whole affair was not in the course of the same transaction. The accused formed themselves into a body with the intention of looting and shooting Sangiah Tevan and frightening away any one who tried to prevent them; otherwise, there is no explanation for such a display of force. It has never been held that in a transaction all the persons engaged must have a common object. Taking the transaction to be the adventure of private war upon which the appellants embarked on April 11th, a historian of that transaction would hardly omit all mention of the shooting as belonging to a totally different transaction. As Benson, J., observes in *Choragudi Venkatadri* v. *Emperor*[4], "it is neither necessary nor advisable to attempt to define the expression 'the same transaction' which the Legislature has left undefined." Each particular case must be tried by common sense and common knowledge of language, and if these tests be applied, the whole affair from the formation to the disruption of this assembly seems obviously to be one transaction.

Therefore, the plea of misjoinder is not sustainable.

It is next argued that the appellants who are not found to have been armed cannot be constructively held guilty under section 144 by the provision of section 149. There can be no doubt that if a member of an unlawful assembly, liable under section 143, Indian Penal Code, to six months' rigorous imprisonment, is armed with a deadly weapon, he is punishable with two years' rigorous imprisonment under section 144. Therefore, being so armed is a thing made punishable by the Penal Code and, consequently, under section 40, an offence.

Now, is the offence so committed by the member of the unlawful assembly in prosecution of the common object of that assembly? Prosecution, in plain English, is following up. They

3. (1921) I.L.R. 49 C. 573 at 596.
4. (1910) I.L.R. 33 M. 502: 20 M.L.J. 220.

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assembled and formed the common object of shooting a man. What did they do to follow it up? Some of them came to the assembly with guns, or stayed in the assembly with guns, and at any rate took care not to be parted from their guns. That seems to be clear following up. Mr. Grant would say that it was mere preparation, but after people have formed themselves into an unlawful assembly, and decided upon their common object, preparation towards that common object is prosecution or following up, and if the preparation happens to be an offence, then they are all equally liable. Suppose they burst in a door, that is not mere innocent preparation for the intended looting. It must be held therefore that this plea also fails.

There remain two pleas *ad misericordiam* on behalf of the murderers sentenced to death. It is clear from the medical evidence that accused 1 shot Alagu Tevan with various pellets through the heart and thigh. He may be taken to have aimed at his stomach and it cannot be said that he did not intend his death. Accused 3 shot Sangiah five inches below the knee and shattered the bones. He had said, "why do you shoot him who was keeping quiet," and for that innocent protest was shot. Mr. Nugent Grant says that the murderer only hoped to maim him, only hoped perhaps to cripple him for life. It was a murderous act without the smallest justification and it resulted in murder. We see no reason to interfere.

It cannot be said that any of the appellants has been treated with undue severity, and we dismiss their appeals.

K.C. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. HORACE OWEN COMPTON BEASLEY, *Chief Justice.*

Neelamraju Venkatanarasimhayya .. *Appellant** (*Plaintiff*)

v.

Neelamraju Rajya Lakshmamma and others .. *Respondents* (*Defendants* 14, 1 *to* 5 *and* 7).

Venkatanarasimhayya *v.* Rajya Lakshmamma.

Limitation Act (*IX of* 1908), *Art.* 141—*Alienation by Hindu widow—Subsequent adoption—Death of adopted boy during minority—Death of widow after succeeding to adopted son—Suit by reversioner to set aside alienation—Starting point of limitation.*

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*S.A. No. 201 of 1927. 1st May, 1930.

Venkata-narasim-hayya *v.* Rajya Lakshmamma.

In 1899 a Hindu widow sold certain property left by her husband and in 1905 she adopted a minor boy. The latter died in 1909 while still a minor and the adoptive mother, who succeeded him, died in 1921 without disputing her previous alienation. A reversioner having instituted a suit in 1923 to recover possession of the property sold,

Held, that the suit was not barred by limitation, because time commenced to run neither from the date of the adoption, nor from the death of the adopted boy, but only from the death of the widow.

Bonomali Roy v. *Jagat Chandra Bhowmick,* (1905) L.R. 32 I.A. 80: I.L.R. 32 C. 669: 15 M.L.J. 267 (P.C.), applied.

Vaidyanatha Sastri v. *Savithri Ammal,* (1917) I.L.R. 41 M. 75: 33 M.L.J. 387 (F.B.), considered.

Second appeal against the decree of the Court of the Subordinate Judge of Bapatla in A.S. No. 241 of 1925 preferred against the decree of the Court of the Principal District Munsif of Ongole in O.S. No. 185 of 1923 (O.S. No. 29 of 1924 on the file of the Court of the Additional District Munsif of Ongole).

B. Somayya for appellant.

P. Venkataramana Rao for 1st respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in this second appeal which arises out of a suit filed by him as a reversioner to the estate of one Nilamraju Butchayya for possession of the suit property. This property was by Ex. XIV sold in the year 1889 to one Nilamraju Bajamma by Ademma, the adoptive mother of Butchayya. The alienee is the 14th defendant in the suit. In 1905 Ademma adopted Butchayya, then a minor boy. He died in 1909 being then still a minor, as has been found by the District Munsif, although there is no finding upon the point of minority by the Lower Appellate Court. On his adoption he divested his adoptive mother of the property and it became invested in him. After his death his adoptive mother got his estate as his legal representative. She died in 1921 and the appellant then filed this suit to set aside the sale under Ex. XIV. It will thus be seen that the suit was filed fourteen years after the death of the adopted son Butchayya.

In the District Munsif's Court the claim was held not to be barred; and *Sreeramulu* v. *Kristamma*[1] was there relied upon. That case decided that where a Hindu widow alienates immoveable property belonging to her husband's estate and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood. A twelve years' period of limitation was under Art. 141 of the Limitation Act given

1. (1902) I.L.R. 26 M. 143: 12 M.L.J. 197.

Venkata-narasimhayya v. Rajya Lakshmamma.

and time was reckoned from the date of her death. In the judgment of the Lower Appellate Court it is pointed out that *Sreeramulu v. Kristamma*[1], which was decided in 1902, must be taken to be overruled by a Full Bench case in 1917 *Vaidyanatha Sastri* v. *Savithri Ammal*[2]. In that case a Hindu widow alienated certain properties for a purpose not binding on the inheritance and thereafter adopted a son and it was held by the Full Bench that the alienation was not binding on the adopted son and that he could sue, during the lifetime of the widow, to set aside the alienation and recover the properties so alienated, his cause of action arising from the time of his adoption. In the course of the judgment of Sir John Wallis, C.J., reference is made to *Bonomali Roy* v. *Jagat Chandra Bhowmick*[3], a decision of the Privy Council. Sir John Wallis says at page 85 as follows:—

"Their Lordships, however, appear to have held expressly that the adopted boy's cause of action for the recovery of the alienated property arose on the date of his adoption, and that time began to run against him in 1856 on his attaining majority, and that the suit became barred in twelve years under Regulation II of 1803 and Act XIV of 1859."

The facts in *Bonomali Roy* v. *Jagat Chandra Bhowmick*[3] were that in 1837 the widow of the owner of a zamindari granted a lease to the predecessors of the defendants as manager for the widow of her adopted son. The latter widow in 1846 adopted a son, who was the father of the plaintiff. He attained majority in 1856 and died in 1880. The suit was brought in 1897 to set aside the lease and it was held that if the lease was void the period of limitation ran from its date and if it was voidable only by the adopted son his right of action arose on his adoption and time would begin to run against him from the date when he attained his majority in 1856. There were, therefore, two dates taken by their Lordships, namely, the date of the adoption and the date of the attainment of majority. With regard to the former they held that the right of action arose then and for the purposes of limitation they held that limitation commenced to run from the latter date.

Applying that judgment to this case, it is quite clear that the cause of action arose in 1905, the date of the adoption, and that had the adoptive son lived, the starting point of limitation would be the date when he attained his majority. But he died, as before stated, a minor. The learned Subordinate Judge has found that it is clear from *Vaidyanatha Sastri* v. *Savithri*

1. (1902) I.L.R. 26 M. 143: 12 M.L.J. 197.
2. (1917) I.L.R. 41 M. 75: 33 M.L.J. 387 (F.B.).
3. (1905) L.R. 32 I.A. 80: I.L.R. 32 C. 669: 15 M.L.J. 267 (P.C.).

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Ammal[2], that the suit became barred by limitation twelve years from the date of Butchayya's adoption. That is certainly not the way I read that case and is certainly not what the Privy Council decided in *Bonomali Roy* v. *Jagat Chandra Bhowmick*[3] for the reasons I have already given. If the sale had been void, then the starting point of limitation would have been the date of the sale, but this sale was not void but voidable. The learned Government Pleader contends on the other hand that the starting point of limitation was the date of the adoption. It was on that date he argues that possession commenced to be adverse because the adoptive mother had ceased to have any right to the property she had become divested of and it had vested entirely in the adopted son. But with great respect to that argument, I cannot see how the fact that she had become divested of the property by reason of the adoption can affect the question of limitation. The adopted son could, through a guardian, have claimed possession of the property. He had his cause of action but he was a minor and subject to a disability. He was not bound to sue and the period of limitation is not abridged by reason of section 6 of the Limitation Act as is contended for by the learned Government Pleader who argues that by reason of that section and section 8 time ran from the date of the adoption but an extension of three years after the attainment of majority is all that is given to the minor. With great respect I do not agree with that contention and it is certainly not the view taken by Sir John Wallis, C.J., in *Vaidyanatha Sastri* v. *Savithri Ammal*[2] or by the Privy Council in *Bonomali Roy* v. *Jagat Chandra Bhowmick*.[3] I must, therefore, hold that the learned Subordinate Judge was wrong in holding that time commenced to run against the adopted son from 1905. He died a minor, his adoptive mother succeeded to the estate and as regards her I think it is clear that she could not be in a position to dispute her previous alienation. She died in 1921 and the present appellant filed the suit in 1923.

In my view, the suit was not barred by limitation and this appeal must be allowed with costs and the case remanded to the Lower Appellate Court to decide all the other questions raised in the appeal and undecided by reason of the decision that the suit was barred by limitation.

B.V.V. *Appeal allowed.*

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2. (1917) I.L.R. 41 M. 75: 33 M.L.J. 387 (F.B.).
3. (1905) L.R. 32 I.A. 80: I.L.R. 32 C. 669: 15 M.L.J. 267 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

P. Varada Pillai .. *Petitioner** (*Defendant*)

v.

P. V. Thillai Govindaraja Pillai .. *Respondent* (*Plaintiff*).

Varada Pillai *v.* Thillai Govindaraja Pillai.

Procedure—Suit, not cognizable by a District Munsif's Court—Dismissal—Revision—High Court's order—Plaint amended—Re-presentation to the same Court—Court-fee.

A suit was filed by the plaintiff in the District Munsif's Court and objection was taken by the defendants that the suit as framed did not lie in the Munsif's Court. On that being decided, against, it was taken in revision to the High Court, where that objection was upheld, though His Lordship observed that the plaintiff might try his chance at an amendment of the plaint in the Lower Court. The plaintiff applied to the District Munsif for getting the plaint amended, but was refused, and his plaint was returned to him. Subsequently, he himself amended it by striking off one relief and re-presented it to the District Munsif. The District Munsif held in favour of the plaintiff. The defendants objected to the procedure, namely, the amendment by the plaintiff and the re-presentation to the same Court.

Held, that the Lower Court's order in accepting the plaint was right.

Karumbayira Ponnapundan v. *Authimoola Ponnapundan,* (1909) I.L.R. 33 M. 262, relied on.

Kannusami Pillai v. *Jagathambal,* (1918) 35 M.L.J. 27: I.L.R. 41 M. 701; *Ramachandrayya* v. *Venkataratnam,* (1925) 22 L.W. 582; *Muthu alias Gurusami Nayaken* v. *Muthu Nayaken,* (1927) 54 M.L.J. (N.R.C.) 12 and *Govindaraju Naicker* v. *Kassim Sahib,* (1927) 54 M.L.J. 409, referred to.

On the question whether the old Court-fee could be utilised,

Held, that as the Court-fee paid was found by the Lower Court to be right and as the objection to the Court-fee did not also lead to any objection as to jurisdiction, the High Court could not interfere in revision.

Muhammad Ellaiyas v. *Rahima Bee,* (1928) 56 M.L.J. 302, followed.

Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the orders respectively of the Court of the District Munsif of Poonamallee, dated 26th July, 1928 and 9th October, 1928, in Original Suit No. 173 of 1928.

M. Chelva Aiyangar for petitioner.

A. C. Sampath Aiyangar and *T. R. Srinivasa Aiyar* for respondent.

The Court delivered the following

JUDGMENT. *C. R. P. No.* 1771 *of* 1928.—The facts out of which this Civil Revision Petition arises may be stated as follows. The suit was filed in the District Munsif's Court of Poonamallee. An objection was taken by the defendant that the suit as framed did not lie in the District Munsif's Court. The District

*C.R.Ps. Nos. 1771 of 1928, 110 and 708 of 1929 and C.M.Ps. Nos. 59 and 85 of 1929. 6th March, 1930.

Varada Pillai v. Thillai Govindaraja Pillai.

Munsif decided against the objection. On a revision petition filed in the High Court, my brother, Jackson, J., held in C. R. P. No. 1263 of 1927, that the objection was well founded and the suit as framed did not lie before the District Munsif. He observed in the course of his judgment that the plaintiff might try his chance at amendment in the Lower Court. When the case went back to the District Munsif the plaintiff applied for amendment of the plaint, he undertaking to amend the plaint in such a way as to make it cognizable by the District Munsif. The District Munsif rejected this application. He passed an order on the plaint returning it to be presented to the proper Court, and the plaintiff got the plaint into his own hands. He amended the plaint himself by striking off one relief and re-presented it before the District Munsif alleging that after the changes he had made it would lie before the District Munsif. The District Munsif now held in his favour though the defendant took the objection that the plaintiff was not entitled to amend the plaint and re-present it in the same Court. The defendant presents this revision petition against the order of the District Munsif.

The learned advocate for the petitioner contends that the effect of the order returning the plaint to be presented to the proper Court is that unless he presents it to the Court which is the proper Court for the original plaint the Court-fees cannot be any more utilised, that if the plaintiff makes further changes in his plaint it is practically a fresh plaint and if the plaintiff wants to file such a fresh plaint he may do so on payment of fresh Court-fees and the old Court-fees cannot be utilised for filing the plaint with alterations before the original Court. The District Munsif relied on *Karumbayira Ponnapundan* v. *Authimoola Ponnapundan*[1] for holding that the plaint will lie in the circumstances. I think the decision of the District Munsif is right. In *Karumbayira Ponnapundan* v. *Authimoola Ponnapundan*[1] the order was: "The plaint should be returned to the proper Court after valuation had been corrected." In that case the valuation had been improperly made. If it was properly made the suit will lie in a different Court. The plaintiff after taking back the plaint struck off some of the properties and re-presented it before the District Munsif, who admitted it. It was held by Abdur Rahim, J., that the order is right. At the end of the judgment he observed: "I do not think that when an amendment is made

1. (1909) I.L.R. 33 M. 262.

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by the plaintiff and sanctioned by the Court, it can be said that the Court had no power to allow or accept the amendment. As will be seen from other cases which will be presently referred to even this condition does not seem to be necessary. It seems to me that in all such cases the plaintiff having got the plaint into his own hands can make such alterations in the plaint as he pleases so as to make the case cognizable by the same Court and re-present it. There is no question of the Court allowing or accepting the amendment. If, after amendment, the plaint lies before that Court, the Court is bound to accept it. On Letters Patent Appeal the order of Abdur Rahim, J., was confirmed by Benson and Sundara Aiyar, JJ. This case was relied on in *Kannusami Pillai* v. *Jagathambal*[2] and the learned Judges held that once a Court holds that it has no jurisdiction over a suit, it ought not to permit an amendment and Sadasiva Aiyar, J., distinguished the decision in *Karumbayira Ponnapundan* v. *Authimoola Ponnapundan*[1]. This decision shows that there is no question of a Court directing an amendment or allowing the amendment or accepting the amendment. The Court has no business to deal with the amendment. It is the party that makes the alterations and presents the plaint. The point came up again in *Ramachandrayya* v. *Venkataratnam*[3]. Odgers, J., after some hesitation found that the two decisions in *Karumbayira Ponnapundan* v. *Authimoola Ponnapundan*[1] and *Kannusami Pillai* v. *Jagathambal*[2] are reconcilable and I agree with him that they are reconcilable. The point again came up before Devadoss, J., in *Manikyam* v. *Sreeramulu*[4]. He there pointed out that the proper course for the Court to take is not to direct amendments so as to make the suit cognizable but to return the plaint leaving the party to make the amendment. All these cases show that the course pursued by the District Munsif is right. Two decisions are referred to by the learned Advocate for the petitioner. One is *Muthu* alias *Gurusami Nayaken* v. *Muthu Nayaken*[5] and the other case *Govindaraju Naicker* v. *Kassim Sahib*[6] is in the same volume, page 409. But these are cases where the Court granted an amendment after holding that it had no jurisdiction. It was held that the order was improper. These are like *Kannusami Pillai* v. *Jagathambal*[2]. I think that the Lower Court's order is right. The petition fails and is dismissed with costs.

1. (1909) I.L.R. 33 M. 262.
2. (1918) I.L.R. 41 M. 701 at 708: 35 M.L.J. 27.
3. (1925) 22 L.W. 582.
4. A.I.R. 1928 M. 559.
5. (1927) 54 M.L.J. (N.R.C.) 12.
6. (1927) 54 M.L.J. 409.

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C. R. P. No. 110 *of* 1929.—In this case after the order of the District Munsif in the other revision petition was passed the defendant still objected that the Court-fee paid is not a proper Court-fee. He repeated his objection that the old Court-fee should not be utilised. The latter objection is really covered by the judgment in the former case. As to the former objection as to what the proper amount of Court-fee is, the District Munsif found that the Court-fee paid was right and I may observe that the objection to Court-fee did not also lead to any objection as to jurisdiction. That being the case I am at present content to follow the decision in *Muhammad Ellaiyas* v. *Rahima Bee*[7]. This revision is dismissed with costs. Pleader's fees Rs. 10 and all other costs.

C. R. P. No. 708 *of* 1929.—This is a revision petition by the plaintiff against the order of the District Munsif refusing the amendment. On the reasoning given in the judgment in the other revision petition his order is right. The petition is therefore dismissed.

C. M. Ps. Nos. 59 *and* 85 *of* 1929.—These petitions are dismissed. No costs.

K.C. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRIAR AND MR. JUSTICE PAKENHAM WALSH.

Sri Rajah Vyricherla Narayana Gajapatiraju Bahadur Garu .. *Appellant** (*Defendant*)

v.

Sri Rajah Vyricherla Narayana Gajapatiraju Saheba of Gangapur .. *Respondent* (*Plaintiff*).

Sri Rajah Vyricherla Narayana Gajapatiraju *v.* Sri Rani Janaki Ratnayammaji.

Easements Act (*V of* 1882), *Ss.* 5 *and* 13, *cls.* (*e*) *and* (*f*)—*Easement of necessity—Right of way—Existence of other means of access—Apparent and continuous easement—Right of way over formed and metalled road—Language of Indian enactment being clear—Reference to English Law—Permissibility.*

Under S. 13 of the Easements Act in cases of partition if an easement is one of necessity, a person to whose share certain property falls is entitled to the easement apart from any question of its being apparent or continuous. An easement of necessity can, however, only arise when the property cannot be used at all without the easement, and not where the easement is merely necessary for the reasonable or more convenient

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*Appeal No. 199 of 1928. 28th November, 1929.

7. (1928) 56 M.L.J. 302.

Sri Rajah Vyricherla Narayana Gajapatiraju *v.* Sri Rani Janaki Ratnayammaji.

enjoyment of the property. Thus a right of way over a road cannot be claimed as an easement of necessity when there is another means of access to the property.

Krishnamanayu v. *Marraju,* (1905) I.L.R. 28 M. 495: 15 M.L.J. 255 and *Sukhdei* v. *Kedar Nath,* (1911) I.L.R. 33 A. 467, relied on.

If the easement is not one of necessity but is merely necessary for enjoying the share of the property as it was enjoyed when the partition took effect, then such an easement should be apparent and continuous. A right of way over a formed and metalled road is a discontinuous easement though it is apparent, and consequently cannot pass under S. 13, cl. (*f*) of the Easements Act.

Abbas Sait v. *Jacob Haroon Sait,* (1909) I.L.R. 33 M. 327: 20 M.L.J. 291, referred to.

Where the language of the Code is clear it is not permissible for Courts in India to refer to the English Law on the subject for the purpose of not giving the words of the Code their plain meaning.

Norendra Nath Sarcar v. *Kamalbasini Dasi,* (1896) L.R. 23 I.A. 18: I.L.R. 23 Cal. 563: 6 M.L.J. 71 (P.C.), *Ramanandi Kuer* v. *Kalawati Kuer,* (1927) L.R. 55 I.A. 18: I.L.R. 7 Pat. 221: 54 M.L.J. 281 (P.C.) and *Mahommad Syedol Ariffin* v. *Yeoh Goi Gark,* (1916) L.R. 43 I.A. 256, referred to.

Appeal against the decree of the Court of the Additional Subordinate Judge of Vizagapatam in Original Suit No. 55 of 1924.

S. Varadachariar, P. Somasundaram and *K. Umamaheswaran* for appellant.

The Advocate-General (A. Krishnaswami Aiyar) for respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit filed by the plaintiff for a declaration that she has a right of way over a road called the "Circular Road" leading to the premises known as the "Uplands House" in Waltair. The Rajah of Kuruppam, who was the owner of this property, died leaving the plaintiff, his daughter, the defendant and the Zamindar of Kuruppam, his sons. After his death the property was partitioned between the plaintiff, the defendant and his brother. The plaintiff got the block marked *A* in the plan annexed to the plaint. The property is a very extensive one. According to the plan, there is what is called a Circular Road leading from the Beach Road to the main building which, according to the evidence, was being used as a means of access to the building during the lifetime of the Rajah of Kuruppam. On the north, there is a Municipal Road and the suit property abuts that road. According to the evidence, there was a way leading from that road to this building which was used for the purpose of carrying materials, when the temple in the compound was built about the year 1902. This road was not subsequently used except as servants' entrance. It

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is, however, clear from the plan that so far as the plaintiff's portion is concerned, there is a mode of access to it from the northern side and it cannot be said that the right to use the road, known as the Circular Road, from the beach side is an easement of necessity in the sense that there could be no reasonable mode of access to the portion which fell to the share of the plaintiff except through the road now in dispute. The plaintiff's claim is that the road of which she claims easement is a continuous, well-formed, gravelled and metalled road leading from the Beach Road into the bungalow compound, partly through the defendant's and partly through her share, and that this road has always been the only road by which access was had from the Beach Road into the bungalow and was used and enjoyed for this purpose from the time of construction of the house by the owners of the "Uplands House", the predecessors-in-title and interest of the plaintiff and the defendant and the Zamindar of Kuruppam, and by them also until the date of partition in the year 1920.

In paragraph III (*d*) the plaintiff says:

"By virtue of the partition and even otherwise by implication of law and common sense, the plaintiff is entitled to the free and uninterrupted user of the said road by her and her representatives, servants, etc., in the same manner in which it was being enjoyed prior to the partition and the same is reasonable, necessary and essential for the proper enjoyment of the portion of the house and grounds which fell to the plaintiff's share as it was being enjoyed prior to the partition."

She says that the defendant obstructed her use of the road.

In paragraph (*f*) the plaintiff says:

"The Beach Road is the most important road in the whole town, and the usual, customary and constant approach, ingress to and egress from the 'Uplands House' has always been from the said road and the value of the plaintiff's share of the house depends substantially upon the existence of such right of user of the road leading from the Beach Road into the 'Uplands House'. The denial of such right, or interference therewith will not only highly inconvenience the plaintiff and prejudice the reasonable and proper enjoyment of the house and grounds by her but will as well affect seriously their value."

In paragraph (*g*) she states:

"The plaintiff is also entitled to the said right as an easement of necessity."

The defendant denied the plaintiff's right to use the road either by virtue of the partition or on any of the other grounds alleged in the plaint. According to him, a portion of the property marked in the plan and measuring about 44 cents which did not originally fall to the plaintiff's share was under the direction of the arbitrators given to the plaintiff on partition in order to allow her means of access to her portion from the

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North Road because the defendant refused to allow her access over the road now in question. He denied that the use of this road was necessary or passed to the plaintiff by implication of law. He says that any user of this road after partition was by his consent. He says that the plaintiff has access to her bungalow from the Municipal Road on the north.

The Subordinate Judge found that the right to use the Circular Road which the plaintiff claims in the suit was neither recognised nor specifically prohibited at the partition. He also found that the plaintiff's claim to use the Circular Road as an easement of necessity could not exist because there is another means by which she can have access to the property, namely, the Northern Road, which abuts the share which fell to the plaintiff. Referring to the plaintiff's claim as an easement of necessity, the Subordinate Judge observes:

"This aspect of the case was not pressed before me very much by the plaintiff's vakil, as there is evidence on record to show that the portion of the plaintiff's share in 'Uplands House' can be reached from the Municipal Road on the northern side of the plaintiff's share of the building through her ground. Plaintiff's vakil only relied upon clause (*f*) to section 13 of the Indian Easements Act and claimed the right to use the Circular Road as an easement, 'apparent and continuous and necessary' for enjoying the share of the plaintiff's portion of the 'Uplands House' as it was enjoyed before the partition took effect, inasmuch as there was no different intention expressed or necessarily implied when the partition took place."

So far as the claim as an easement of necessity is concerned, it is difficult to find, on the evidence and the plan, that the easement is one of necessity.

As regards easements of necessity the law is clear.

In *Krishnamarazu* v. *Marraju*[1] the learned Judges in dealing with clause (*e*) to section 13 of the Easements Act observed:

"We think the word 'necessary' must be construed in its ordinary sense. If *A* has a means of access to his property without going over *B's* land, *A* cannot claim a right of way over *B's* land on the ground that it is the most convenient means of access."

In *Sukhdei* v. *Kedar Nath*[2] it was held that the easement of necessity was an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. A similar view was taken in *Chunilal Mancharam* v. *Manishankar Atmaram*[3] as to the meaning of "easement of necessity". In that case the Easements Act was held not applicable as it was not extended to the Bombay Presidency till Act VIII of 1891 was passed.

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1. (1905) I.L.R. 28 M. 495: 15 M.L.J. 255.
2. (1911) I.L.R. 33 A. 467.
3. (1893) I.L.R. 18 B. 616 at 627.

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As regards the claim of the defendant that at the partition it was expressly agreed that there should be no right of way, we agree with the Subordinate Judge in thinking that it is not made out.

The main ground on which the argument for the defendant is based is that the plot of land measuring 44 cents was not originally included in the division as falling to the plaintiff's share, that without it she could not enter the portion of the main building which was allotted to her, although she could enter the other portions by the Northern Road and that this piece of land was given for that purpose to avoid any right she may claim to enter the main building from the Circular Road.

In this case unfortunately the partition is not by any deed. It was effected by two arbitrators, Mr. Forbes who was then the District Judge of Vizagapatam and defendant's second witness, Mr. Appa Rao who was chairman of the Vizagapatam Municipality. As the 44 cents would have allowed the plaintiff direct access from the outhouses to the portion that fell to her share without her making any structural alteration, it is probable that these 44 cents were granted to her for that purpose. We are not satisfied on the evidence that this was due to the defendant's refusal to allow her access by the main road at the time of the partition and this refusal being accepted by the arbitrators and an altered arrangement being made to give the plaintiff another means of access.

The position, therefore, is as put by the Subordinate Judge that it was neither allowed nor prohibited. The question has, therefore, to be dealt with as a question of law as to the rights of parties under the Easements Act.

Section 13 of the Easements Act (V of 1882) refers to easements of necessity and *quasi*-easements in cases where a person transfers or bequeaths property to another and in cases where a partition is made of the joint property of several persons. The portion of the section which is relevant to the present case, which is one of partition, runs as follows:—

"Where a partition is made of the joint property of several persons—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(*f*) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in clauses (*a*), (*c*) and (*e*) of this section are called easements of necessity."

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Section 5 defines continuous easements and apparent easements and it runs as follows:—

"Easements are either continuous or discontinuous, apparent or non-apparent. A continuous easement is one whose enjoyment is or may be continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him. A non-apparent easement is one that has no such sign."

Illustration (*b*) to this section is this—

"A right of way annexed to *A's* house over *B's* land. This is a discontinuous easement."

It is, therefore, clear from the Easements Act that a right like the present is a discontinuous easement although it is apparent. The effect of section 13 is this:—that in cases of partition, if an easement is one of necessity, a person, to whose share certain property falls, is entitled to the easement apart from any question of its being apparent or continuous, but that if the easement is not one of necessity but is merely one necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, then such an easement should be apparent and continuous. A distinction is clearly drawn between what was actually necessary and what, though not actually necessary in the sense of there being no other mode of enjoying the property, is required for the purpose of enjoying it as it was enjoyed when the partition took place.

The Easements Act was passed in 1882, and when it was passed it only extended to the territories administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg. It was subsequently extended to Bombay and the United Provinces in 1891 but has not been extended to Bengal. It is important to bear this in mind in dealing with the decisions of the Calcutta High Court, where the learned Judges are not trammelled with the provisions of the Easements Act and the definitions contained therein and the decisions of the Bombay and Allahabad High Courts before the Act was in force there (1891).

So far as the Madras High Court is concerned, the authorities are to the effect that a right of way over a road is not an apparent and continuous easement and that unless it is an easement of necessity it will not pass merely on the ground of its being necessary for the use of the house as conveniently as it was before the partition.

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In *Krishnamarazu* v. *Marraju*[1] it was held that where a person has a means of access to his property without going over another's land, he could not claim a right of way over the other's land on the ground that it was the most convenient means of access and that the law under section 13, clause (*e*) of the Easements Act is the same as the law in England. In dealing with clause (*f*) of section 13 of the Easements Act, Sir Arnold White, C.J., and Davies, J., observed:

"It is admitted that the respondent has a means of access to his property without going over the appellant's land and we must accordingly hold that he has no easement of necessity. He is not entitled to an easement under clause (*f*) of the section since the easement which he claims is not apparent and continuous. The respondent failed to establish any right by agreement."

This was a case where the plaintiff and the defendant who were brothers effected a partition by which amongst other things they divided certain houses and open sites.

In *Esa Abbas Sait* v. *Jacob Haroon Sait*[4] it was held by Sir Ralph Benson, Offg. C.J., and Krishnaswami Aiyar, J., that a right of way is not an apparent and continuous easement within the meaning of section 13 of the Easements Act. This was a case where there was a lane running to the east of the plaintiff's house and west of the defendant's house from north to south which was enjoyed in common by the plaintiff and the defendants and their predecessors-in-title and the plaintiff claimed it as an easement. As regards the right of way claimed, the learned Judges observed:

"A right of way is not a continuous easement (*see* illustration (*b*) to section 5 of the Indian Easements Act, V of 1882). And, therefore, even assuming that it was used as a passage for scavengers at the time when Lazaro owned both the premises there would be no apparent and continuous easement within the meaning of section 13 of the Indian Easements Act."

In *Wutzler* v. *Sharpe*[5] the property owned by the plaintiffs and the defendant were at one time united and there was a road which led from one portion of the property which belonged to the plaintiffs to another portion which belonged to the defendant. The plaintiffs claimed the road to the defendant's property for the purpose of getting water and the defendant refused permission. The plaintiffs sued the defendant for a declaration of their right of way over the road. As the plaintiffs did not produce the deed under which they became the owners of the

1. (1905) I.L.R. 28 M. 495: 15 M.L.J. 255.
4. (1909) I.L.R. 33 M. 327: 20 M.L.J. 291.
5. (1893) I.L.R. 15 A. 270.

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property, the learned Judges held that no title by grant could be proved to have passed, and that their only claim could be to claim the easement as an easement of necessity or an easement the intention to grant which should be inferred from the circumstances. It appears from the judgment that the Easements Act was made applicable to the United Provinces on the 6th of March, 1891 and this suit was filed before the Easements Act was made applicable. After dealing with the English cases on the subject and expressing their dissent from the decision of the Calcutta High Court in *Charu Surnokar* v. *Dokouri Chunder Thakoor*[6] the learned Judges held that the right of way did not pass.

In *Sukhdei* v. *Kedar Nath*[2], which was a decision after the Easements Act was made applicable to the United Provinces, it was held that an easement of necessity was an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. This case arose out of a partition of immoveable property and the question was as regards a passage in the property which fell to the share of the defendant. The learned Judges referred to the English cases as to what would be an easement of necessity. There was no suggestion in that case that, where the Easements Act applied, a right of way which was not an apparent and continuous easement would pass under clause (*f*) of the Easements Act in case of partition of properties, but it is open to the remark that in this decision the applicability of clause (*f*) has not been considered.

In *Daroga Lal* v. *Devi Lal*[7] it was held that an easement of necessity could only arise when the property could not be used at all without the easement, and not where the easement was merely necessary to the reasonable enjoyment of the property.

Reference has been made by the learned Advocate-General for the respondent to the decision in *Charu Surnokar* v. *Dokouri Chunder Thakoor*,[6] *Kadambini Debi* v. *Kali Kumar Haldar*[8] and *Purnendu Narain Roy* v. *Dwijendra Narain Roy*[9]. As the Easements Act is not applicable to Calcutta, the learned Judges of the Calcutta High Court were not bound by any statutory definition or any statutory provisions and they were at liberty

2. (1911) I.L.R. 33 A. 467.
6. (1882). I.L.R. 8 C. 956.
7. (1918) 48 I.C. 670.
8. (1899) I.L.R. 26 C. 516.
9. (1907) 8 C.L.J. 289 at 292.

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to follow the trend of the English decisions which, as we shall point out later, practically gave a right of way, though not of absolute necessity, in respect of contiguous properties in the case of well-formed and metalled roads.

In *Charu Surnokar* v. *Dokouri Chunder Thakoor*[6] the land held by the plaintiff and the defendant originally belonged to the same owner. A path had been made by the original owner. The District Judge was of opinion that the case fell under section 26 of the Limitation Act and that the defendant had not proved 20 years' peaceable, open and uninterrupted exercise of the right of way. The High Court was of opinion that the easement might be acquired not only under section 26 of the Limitation Act but by virtue of the presumed grant. In their view the right of way might pass as a *quasi*-easement. The learned Judges observed:

"This implied grant might arise in one of two ways:—(*i*) The use of the path and ghat might be absolutely necessary to the enjoyment of the defendant's tenement, in which case, there would be an easement of necessity; (*ii*) the use of the path and ghat, though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance; and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with the defendant's tenement. This latter case is discussed in the books under the principle of the disposition of the owner of two tenements (*Destination du pere de famille*). *See* Gale on Easements, 5th Edition, pp. 96, 97 and following pages; and as to right of way, p. 103 note, p. 124 note and *Pyer* v. *Carter*[10]. This principle is just and fair and accords with common sense. It is in consonance with the rule of justice, equity, and good conscience, which must guide the Courts in the absence of positive direction by the Legislature."

So far as the passage in Gale cited is concerned, the passing of easements on the analogy of the principle of *destination du pere de famille* was disapproved of by Lord Westbury in the case of *Suffield* v. *Brown*[11] which was decided in 1864. After referring to Gale on Easements, the learned Lord observes:

"But this comparison of the disposition of the owner of two tenements to the *destination du pere de famille* is a mere fanciful analogy from which rules of law ought not to be derived."

Moreover in *Charu Surnokar* v. *Dokouri Chunder Thakoor*[6] the learned Judges themselves point out that the principle of justice, equity and good conscience on which they purported to act can only be applied in the absence of positive direction by

6. (1882) I.L.R. 8 C. 956.
10. (1857) 1 H. & N. 916 at 922: 156 E.R. 1472.
11. (1864) 4 De G.J. & S. 185: 46 E.R. 888.

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the Legislature. And under section 5 of the Easements Act it is clear that a right of way is not an apparent and continuous easement.

In *Ram Narain Shaha* v. *Kamala Kanta Shaha*[12] the suit related to a right of way. There were two properties which originally belonged to the same owner but subsequently there was a severance, the plaintiff being entitled to one portion and the defendant to another portion. It was held that implication of a grant of easement upon the severance of a tenement might extend to a way but that it would do so only where there had been some permanence in the adaptation of the tenement from which continuity could be inferred. The learned Judges in dealing with the contention based on the decision in *Charu Surnokar* v. *Dokouri Chunder Thakoor*[6] observed:

"We are, however, of opinion that the contention is not sound, and that the case cited is distinguishable from the present. The presumption in favour of the grant of an easement upon the severance of a heritage by its owner into two or more parts arises primarily with reference only to continuous and apparent easements; and a 'way' is evidently neither a 'continuous' nor always an 'apparent' easement.

It is true that in certain cases referred to in text books on the subject—*See* Gale on Easements, 6th Edition, pp. 108 to 123 and Goddard on Easements, 5th Edition, pp. 174 to 186, implication of a grant of an easement, upon the severance of a tenement, has been held to extend, under certain circumstances, to a 'way,' but that is so only where there has been some permanence in the adaptation of the tenement, from which continuity could be inferred. In other words the extension of the rule can hold good, if at all, only in the case of 'a formed road,' to use the language of Lord Justice Fry in *Thomas* v. *Owen*[13], 'made over an alleged servient tenement, to and for the apparent use of the dominant tenement'."

Then the learned Judges say that in that case not only was there no finding of fact that there had been any such permanence of adaptation, any such formed road, but there was no case of an implied grant suggested in the plaint or issues. We may point out that the learned Judges refer to Gale on Easements and are guarded in stating that the rule can hold good, if at all, only in the case of "a formed road". They do not decide that in the case of "a formed road" the easement can be said to be an apparent and continuous easement.

There is another case at p. 516 in the same volume, *Kadambini Debi* v. *Kali Kumar Haldar*[8]. But that relates to a right of passage of light and air on partition of a family dwelling house. The learned Judges there point out that, there being

6. (1882) I.L.R. 8 C. 956.
8. (1899) I.L.R. 26 C. 516.
12. (1899) I.L.R. 26 C. 311.
13. (1887) L.R. 20 Q.B.D. 225 (231).

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no enactment of the Legislature applicable to the case in question, the question will have to be decided and answered with reference to the principles of justice, equity, and good conscience and they think that the rule of English Law of an implied grant of easement on severance of tenements is in accordance with the principles of justice, equity and good conscience and should be followed. Here again we may point out that if the Easements Act were applicable there could be no question of contravening its provisions by the application of the principles of justice, equity and good conscience.

In *Purnendu Narain Roy* v. *Dwijendra Narain Roy*[9] a dispute arose as to a right of way on a partition of property between brothers. The District Munsif decided against the right of way inasmuch as it was not an easement of necessity. This judgment was confirmed by the District Judge. In dealing with the right of way, Mookerjee, J., after stating that the respondent's vakil was not prepared to contend that there was an implied reservation at the time of the exchange, observed:

"In the first place, it is doubtful, according to the finding of the learned District Judge, whether there was at the time of the partition and exchange, an existing right of way, at any rate, there was none which had been used for any length of time; and clearly, as the Munsif finds (which finding does not appear to have been challenged before the District Judge), whatever way there might have been, was not a formed or metalled road but an undefined track."

It is argued from these observations that if there was a formed and metalled way that would pass as an easement. We do not think that this case takes us any farther than *Kadambini Debi* v. *Kali Kumar Haldar*[8].

Reference has been made to *Ranchordass Amthabhai* v. *Maneklal Gordhandass*[14]. We may point out that this case was before the Easements Act was made applicable to the Bombay Presidency.

It is argued by the learned Advocate-General for the respondent that the distinction between apparent and continuous and non-apparent and discontinuous easements is one which is known to the English as well as the Indian Law, that in determining whether an easement would pass under the Easements Act as regards a right of way, the English law before the passing of the Act was that in the case of a formed road it was treated as a continuous easement, that the subsequent develop-

8. (1899) I.L.R. 26 C. 516.
9. (1907) 8 C.L.J. 289.
14. (1890) I.L.R. 17 B. 648.

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ment of the English Law made it clear that an easement was held to exist when there was a formed road though it was not strictly a continuous easement, and that in interpreting the Easements Act it would be relevant to refer to the English decisions on the subject and to apply those decisions to cases where such a right is claimed in India. It is pointed out that in the case of an easement of necessity it has been held that the law in India and England is the same and English decisions have been referred to.

It seems to us that where the law has been codified we are bound by the Code and it is not permissible for us to refer to the English Law on the subject where the provisions of the Code are clear for the purpose of not giving the words of the Code their plain meaning. We may in this connection refer to the decision of their Lordships of the Privy Council in *Norendra Nath Sarcar* v. *Kamalbasini Dasi*[15], where their Lordships condemned the course taken by the Subordinate Judge who first of all on a consideration of the English case-law and the opinion of the text-writers determined what the law in England was at the date of the Succession Act and then construed the Succession Act on those lines that it was not intended by the Legislature to alter the law in India by departing from the law of England. Their Lordships refer to the observations of Lord Herschell in the *Bank of England* v. *Vagliano*[16], with approval.

We may also in this connection refer to *Ramanandi Kuer* v. *Kalawati Kuer*[17] and *Mahommad Syedol Ariffin* v. *Yeoh Goi Gark*[18].

In *Ramanandi Kuer* v. *Kalawati Kuer*[17] their Lordships of the Privy Council, after referring to the divergence of opinion in the Courts in India as regards the law and procedure governing cases for revocation of probate, owing in part to the introduction into Indian practice of the difference in English Law between the grant of probate in common form and probate in solemn form, observed:

> "It is worse than unprofitable to consider how far, if at all, that distinction has been incorporated into Indian Law. It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English Law upon which it may be founded."

15. (1896) L.R. 23 I.A. 18: I.L.R. 23 C. 563: 6 M.L.J. 71 (P.C.).
16. (1891) A.C. 107.
17. (1927) L.R. 55 I.A. 18: I.L.R. 7 Pat. 221: 54 M.L.J. 281 (P.C.).
18. (1916) L.R. 43 I.A. 256.

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In *Mahommad Syedol Ariffin* v. *Yeoh Goi Gark*[18] the question turned on the construction of section 32, sub-section (5) of the Straits Settlements Ordinance III of 1893, which corresponds to the Indian Evidence Act I of 1872. The Courts below excluded evidence of an entry made as regards the date of defendant's birth by his deceased father in a book in which he made similar entries with regard to the family. Their Lordships of the Privy Council after referring to the decisions under the Indian Evidence Act and the fact that such evidence was admissible observed:

> "The Courts below have however declined to accept this principle. They proceed upon two grounds. In the first place they think that the rule with regard to hearsay evidence adopted in the English case of *Haines* v. *Guthrie*[19] should be followed in the Straits Settlements, and that that rule is not varied by the clause just cited from the Evidence Ordinance. And in the second place they hold that the illustration given in the statute does not in fact illustrate the section. On the first point, the view of their Lordships is that the rule and principle of the colony must be accepted as it is found on its own Evidence Ordinance, and that the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the Statute under construction be varied, or denied effect."

Their Lordships hold that illustrations appended to sections of a statute should be accepted as being of relevance and value in construing the text: and should be rejected as repugnant to the section only as the last resort of construction.

Where the provisions of an Indian enactment follow the provisions of an English enactment or a well-settled rule of English Law or where the meaning of certain expressions and their legal import are not clear, no doubt reference to English authorities becomes useful and often necessary.

Rash Behary Shaha v. *Nrittya Gopal Nundy*[20] applies to this class of cases. In that case the question was as to the meaning of the word "refusal" in section 39 of the Contract Act and it was held that though the English Law did not govern the case, the views of eminent English Judges on the meaning of the word "refusal" may well be considered.

Reference has been made to the English decisions on the subject of right of way. In this connection we may refer to the case-law in England as it stood in 1882 when the Indian Easements Act was passed.

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18. (1916) L.R. 43 I.A. 256. 19. (1884) 13 Q.B.D. 818.
20. (1906) I.L.R. 33 C. 477.

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In *Glave* v. *Harding*[21], which was decided in 1857, the facts so far as they are material for the purpose of this appeal were these:—A land which originally belonged to the Crown was leased to one Merrick for building purposes on certain terms as to the nature of the building. One of the terms was that when he built the houses according to the plan, a separate lease of each house was to be granted to him or to his assigns for 80 years at such rent as the Commissioners of Woods and Forests would agree upon. Merrick built houses in Bainbridge Street and New Oxford Street and there was a way connecting the two blocks of houses. Merrick mortgaged his interest in the whole of the premises to certain parties and assigned them to the defendant. He then blocked up both the entrances. The question was whether the plaintiff was entitled to the right of way. Bramwell, B., in dealing with the right of way claimed, observed:

"The plaintiff's title was derived from the lease, and unless the lease granted the right of way it did not exist. It did not grant the right in terms, and the only way in which it could grant it was, that the condition of the premises at the time when the lease was granted, showed, that it was intended that the right of way should be exercised upon the principle of law I have adverted to; that by the devolution of the tenements originally held in one ownership, a right of way to a particular door or gate would, as an apparent and continuous easement, pass to the owners and occupiers of both of them. But I think that the way in question was not a continuous and apparent easement within that principle of law; and therefore I arrive at the conclusion that there was no evidence of the right of way alleged in this case."

In *Worthington* v. *Gimson*[22], which was decided in 1860, the plaintiff claimed a right of way over the land of the defendant. The facts as set out in the report are that a certain land lying partly in one parish and partly in another parish belonged in 1820 to two persons each being entitled to an undivided half. A right of way existed from a farm, part of this property, across certain lands to another farm on the said property. The right of way had for many years been used by the occupiers of both the farms. In 1820 one of the co-owners conveyed his undivided half in one parish with all the rights, members, easements and appurtenances. The other co-owner also conveyed his undivided moiety. The deed contained no express reservation of the right of way to either party. Then the plaintiff in this action and the previous occupiers of the farm used the right of way from 1820 to 1859 but were obstructed by the defendant who was then the occupier of the

21. (1858) 27 L.J. Ex. 286.
22. (1860) 2 El. & El. 618: 121 E.R. 232.

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other farm. It was held that the plaintiff could not recover, the right of way not passing under the deed of partition, and not being an apparent and continuous easement necessarily passing upon the severance of the property, as incident to the separate enjoyment of the portion severed. At the trial Williams, J., non-suited the plaintiff even though the jury found that the occupiers of the farm claimed by the plaintiff had enjoyed the way as of fact up to and before the deed of partition and that the way had been enjoyed for 20 years since the partition deed up to the time of the obstruction.

A rule was obtained. It was argued that the way had been constantly and regularly used up to the time of the partition, that it was known and apparent to both the parties to the partition and that complete enjoyment of the portion of the property in the occupation of the plaintiff could not then, and cannot now, be had without it. Wightman, J., was of opinion that it was not an easement of necessity. Crompton, J., agreed with Wightman, J., and observed:

> "In the present case the parties have not used apt words in the deed to express an intention to pass the way in dispute and the general words which follow the description of the property intended to be conveyed do not add to or alter the previous words of conveyance. It is said that this way passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say, from the nature of a road, whether the parties intended the right of using it to pass. It may, besides, be naturally supposed to have been the intention of the parties that, on the partition of the property, all ways not incident to the separate enjoyment of each of the severed portions should cease."

In *Langley* v. *Hammond*[23], which was decided in 1868, a question arose as to a right of way. In that case, a lessee surrendered to his lessor a part of the demised premises "together with all ways, etc., therewith now used, occupied and enjoyed" with a proviso that the defendant should fence off the premises surrendered from those still occupied by the lessee. There had been always unity of seisin and occupation of the whole farmyard and the road way had been made and used by former occupiers of the yard and by the present lessee for the convenience of carting heavy loads to and from the yard and the farm buildings. There was, however, no existing approach to the premises surrendered from the defendant's land. The

23. (1868) 3 Ex. Cas. 161.

question arose as to the right of the road way as a means of access to the surrendered premises. It was held that no right to use the road way as a means of access to the surrendered premises passed to the defendant. Kelly, C.B., was of opinion that by a grant of hereditaments with all "ways therewith now used and occupied and enjoyed" those ways only passed which had at some former period been used as of right therewith. In connection with this road way Bramwell, B., observed:

"Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is that there is here really no definite road."

In *Watts* v. *Kelson*[24], which was decided in 1871, the easement claimed was an easement to the use of a drain. It appears from the facts that the plaintiff and the defendant were the owners and occupiers of two adjoining properties which up to 1863 belonged to a single owner. In that year the owner conveyed to the plaintiff the premises in respect of which the easements were claimed. The premises were conveyed, together with "all roads, ways, waters, watercourses, rights, privileges, advantages and appurtenances whatsoever to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof, held, used, enjoyed or reputed as part thereof or appurtenant thereto." Some months after the first conveyance the owner conveyed to the predecessor of the defendant the property over which the easements were claimed. There was an artificial watercourse which was originally made for the express purpose of supplying the cattle-sheds with water and was made by the owner of both properties. There was also a carriage way between two points a few yards from each other and this was used as a way for bringing carts from point *A* to point *B*. The defendant obstructed the way alleging that the right of way was only a right of footway. The Master of the Rolls held that the plaintiff proved the right to the carriage way but dismissed the bill so far as it related to the right of water.

In the course of the argument Mellish, L.J., and James, L.J., were of opinion that *Pyer* v. *Carter*[10] was good law in spite of Lord Westbury's disapproval of it.

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10. (1857) 1 H. & N. 916: 156 E.R. 1472.
24. (1871) 6 Ch. App. 166.

Sri Rajah Vyricherla Narayana Gajapatiraju v. Sri Rani Janaki Ratna. yammaji.

During the course of the argument Mellish, L.J., remarked:

"When a man walks over his own land in a particular direction he is not using anything, he is merely going where he pleases on his own property; but when there is a structure, erected for a purpose connected with a certain part of his property, the case is quite different. I am not satisfied that if a man construct a paved road over one of his fields to his house solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field."

This was an observation made by Mellish, L.J., in the course of the argument and reliance is placed upon it by the learned Advocate-General for the respondent as being a decision that a paved road although it is not continuous would still pass even though it is not an easement of necessity.

In his judgment Mellish, L.J., referred with approval to *Polden* v. *Bastard*[25] and observed:

"In *Polden* v. *Bastard*[25] Chief Justice Earle delivering the unanimous judgment of the Exchequer Chamber says: 'There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognise this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass."

Then the learned Lord Justice observes that in that case the easement was in its nature continuous so far as the watercourse was concerned, that the watercourse was necessary for the use of the tenement conveyed, and that no other supply of water equally convenient or equally pure could have been obtained.

We do not think that this case can be said to be a decision on the question that a paved road was a continuous easement.

It thus appears that when the Easements Act was passed, the English decisions had not established clearly that a formed and metalled road was or may be treated as a continuous easement and it cannot be said that the Easements Act simply codified what was the law in England. It is no doubt true as contended by the Advocate-General for the respondent that the framers of the Easements Act preferred to follow the ruling in *Pyer* v. *Carter*[10] which was referred to with approval by Mellish, L.J., in *Watts* v. *Kelson*[24] to the ruling in *Wheeldon* v. *Burrows*[26].

In *Pyer* v. *Carter*[10] it was held that where the owner of two or more adjoining houses sells one of them to a purchaser,

10. (1857) 1 H. & N. 916: 156 E.R. 1472.
24. (1871) 6 Ch. App. 166.
25. (1865) 1 Q.B. 156 at 161. 26. (1879) 12 Ch. D. 31.

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such a house was entitled to the benefit and was subject to the burden of all existing drains communicating with the other house without any express reservation by the grantor for that purpose.

In *Wheeldon* v. *Burrows*[26] it was held that in the case of a grantor, express reservation was necessary with certain exceptions, as in the case ways of necessity, while in the case of a grantee of part of a tenement, all those continuous and apparent easements over the other part of the tenement which are necessary for the enjoyment of the part granted and have been hitherto used therewith would pass as a general rule.

Aldridge v. *Wright*[27] affirmed *Wheeldon* v. *Burrows*[26] and the exceptions in the case of a grantor are given by Greer, L.J., in his judgment.

This departure from the English Law, however, does not in our opinion lead to the conclusion that a departure should be made as regards apparent and continuous easements in dealing with section 13 of the Easements Act.

So far as the case-law in England subsequent to the passing of the Easements Act is concerned, the trend of the authorities is to treat a formed and metalled road as a kind of apparent and continuous easement. We may refer to *Brown* v. *Alabaster*[28], *Head* v. *Meara*[29] and *Aldridge* v. *Wright*.[27] But we are of opinion that having regard to the provisions of the Easements Act it is not open to us to follow the English decisions subsequent to the Easements Act and to hold that a formed and metalled pathway would be an apparent and continuous easement for the purpose of determining the rights of parties under section 13, clause (*f*) of the Easements Act.

We are of opinion that the plaintiff is not entitled to the right of way claimed as an easement of necessity and not being an apparent and continuous easement it would not pass under the provisions of section 13, clause (*f*) of the Easements Act.

We reverse the decree of the Lower Court and dismiss the plaintiff's suit with costs throughout.

B.V.V. *Appeal allowed.*

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26. (1879) 12 Ch. D. 31.
27. (1929) 2 K.B. 117.
28. (1887) 37 Ch. D. 490.
29. (1912) 1 Ir. Rep. 262.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE PAKENHAM WALSH.

Kumaraswami Asari and others .. *Appellants**
(Persons permitted to conduct the appeal on behalf of the suit temple by order, dated 16th November, 1927, on C. M. Ps. Nos. 4249 and 4250 of 1926)

v.

Poojari Lakshmana Goundan and others .. *Respondents*
(Defendants 1, 3 and 4 and Plaintiffs 1 and 3).

Kumaraswami Asari *v.* Poojari Lakshmana Goundan.

Religious endowment—Public temple of recent origin—Nature of dedication—No written deed—Usage—Admissibility—Right of pujari to surplus offerings—Legality.

Where a temple is of comparatively recent foundation and its origin well known and where there is no deed of gift or dedication the incidents of the dedication must be determined by the usage. There is nothing illegal in a trust by which the surplus money after paying for the maintenance of the temple is retained by the founder.

Remarks of Seshagiri Aiyar, J., in *Subramania Aiyar* v. *Lakshmana Goundan,* (1919) 54 I.C. 177: 27 M.L.T. 11, dissented from.

Appeal against the decree of the Court of the Subordinate Judge of Salem in O.S. No. 4 of 1916 (O.S. No. 32 of 1914 on the file of the District Court of Salem).

K. V. Krishnaswami Aiyar and *B. V. Viswanatha Aiyar* for appellants.

T. Rangachariar, A. Srirangachari and *S. Ramanujam* for 1st respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the judgment and decree of the Subordinate Judge of Salem in O.S. No. 4 of 1916, dated the 30th November, 1925. The suit relates to the temple of Sri Kandaswami in the village of Kalipatti in the Salem District. The temple was founded by one Lakshmana Goundan, the grandfather of the 1st defendant. He died about the year 1856 or 1857. The 2nd defendant who was the son of the 1st defendant was added as a party. He has since died and his sons have been added as his legal representatives. The plaintiffs are Hindu worshippers of the temple. They instituted the suit for a scheme of management. The 1st defendant claimed that the temple was a private temple. The Subordinate Judge, Mr. Narayana Aiyar, found it to be a private temple. On appeal to the High Court, Abdur Rahim and Old-

*Appeal No. 439 of 1927. 7th November, 1929.

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field, JJ., differed, the former finding that the temple was a public temple and the latter holding it to be a private one. A decree was, therefore, made dismissing the appeal, and from that decree the plaintiffs appealed under the Letters Patent, and three learned Judges, who heard the appeal, Sadasiva Aiyar, Seshagiri Aiyar and Burn, JJ., delivered separate but concurring judgments finding that the temple was a public one. See *Subramania Aiyar* v. *Pujari Lakshmana Goundan*[1]. Against this, an appeal was preferred to the Privy Council which decided that the temple was a public one. See *Pujari Lakshmana Goundan* v. *Subramania Aiyar*[2]. The suit was, therefore, remanded for framing a scheme. It is against the scheme so framed that the present appeal is preferred and the main question at issue is whether the lands which now stand in the name of the 1st defendant should be treated as temple property or whether they should be held to belong to the 1st defendant. The learned Subordinate Judge, Mr. L. R. Anantanarayana Aiyar, has held that they belong to the 1st defendant.

That the properties in dispute stand in the name of the 1st defendant is not denied. The argument of the learned Advocate for the appellants is briefly this. The temple having been found to be a public one, it must be presumed that all offerings made to the God were the property of the God and that as it is admitted that the suit properties must have come practically entirely out of the offerings to the God, they must be held to be the property of the God of which the 1st defendant was only a trustee. It is further argued that the learned Subordinate Judge wrongly threw the onus of proof under these circumstances on the plaintiffs. For the other side, it is contended that the temple having been admittedly a fairly recent one and there being no written deed of the dedication, usage must determine the nature of the trust and that, in fact, the gifts were offered on the understanding that, after defraying the expenses of the temple, the remainder should go to the founder and his heirs. It is also contended that the onus of proof that these lands which stand in the name of the 1st defendant are temple properties was rightly laid on the plaintiffs. The whole evidence being before us, the question of onus is not very important.

The history of this temple has been narrated in several judgments in the case and it may be summed up in the words

1. (1919) 54 I.C. 177: 27 M.L.T. 11.
2. (1924) M.W.N. 278 (P.C.).

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of their Lordships of the Privy Council (1924 M.W.N. at page 279):

"Lakshmana Goundan, the grandfather of the 1st defendant, lived in a small house which belonged to him in the village of Kalipatti. He was a devout Hindu and originally a poor man. He maintained in his house an idol of the goddess of Amman, which was the private idol of his family. He was also a devout worshipper at the public temple at Palni at which there was an idol of the God Subramaniaswami, and he made yearly pilgrimage to Palni with offerings to that God. It is said, and probably with truth, that he dreamt that he should install at his house at Kalipatti an idol of the God Subramaniaswami and that the God would come to his house and enable him to foretell events. He did install that idol at his house, adopted the ritual which was followed at Palni, and allowed Brahmans and other Hindus of various castes to worship the idol as if it was a public idol. He acted as the pujari of the idol and received, as the pujari, offerings made to the idol by worshippers and fees which he charged in respect of processions and other religious services. He obtained a great reputation as a holy man and as being enabled by the God to foretell events."

Their Lordships then proceed to describe how the number of worshippers increased and extensions to the temple were made by Lakshmana Goundan. They proceed (at page 280):

"On certain days in each week the Hindu public was admitted by him free of charge to worship in the greater part of the temple, to one part only on payment of fees, and to the inner shrine apparently not at all. With the income which he derived from offerings and fees at the temple he efficiently maintained the temple as if it were a public temple and discharged all the expenses connected with the temple and the worship of the idol there. That may be assumed from the reputation which the temple acquired against the Hindus. No accounts have been produced, probably he kept none, but it may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immoveable property which he possessed before he died."

The only fact that may be added to this is that apparently the date of his bringing the God from Palni was about 1821 and their Lordships find that the temple itself was founded between 1841 and 1856.

In dealing with this appeal, it has to be remembered that the sole point decided by the Privy Council was that the temple was a public and not a private one. The remarks beyond this point made by the learned Judges of this Court and which have been sought to be used as arguments, however valuable they may be, are *obiter*. Now, we think it is clear in a case of this sort, where the temple is of comparatively recent foundation and its origin well known and where there is no deed of gift or dedication, the nature of the dedication must be determined by the usage. It has to be remembered that the idol was brought by Lakshmana Goundan from Palni to his house a considerable time, some twenty years or more, before the temple was built. The growth of the

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temple and of its importance was gradual. The allegation of the plaintiffs that there was a temple in the place before has been found by all the Courts to be untrue. Mr. Justice Seshagiri Aiyar says (1919 M.W.N. at page 916):

"In the absence of any writing and in the absence of any evidence of persons who were alive in 1819, it is not possible to say when the dedication was made. It is the usage in the temple and it is the practice that has been observed that should guide us in determining this point. From this point of view, I have no hesitation in holding that the temple was dedicated at least during the life-time of Lakshmana Goundan."

Mr. Justice Burn says at p. 917:

"As might be expected in the circumstances, the progress of the building was gradual. The main features had, however, been completed by the time of Lakshmana Goundan's death in 1857."

It was sought to be argued (1) that usage could not be held to evidence the nature of the trust, and (2) that a trust by which the surplus money after paying for the maintenance of the temple would go to the pujari would not be a legal trust.

As regards the first point no satisfactory authority was quoted. The following cases were relied on:—*Puravtiya Goundan* v. *Poonachi Goundan*[3]. That was a case where there was no image of the Goddess in the temple and she was represented by *Akasa* or emptiness. It was nevertheless held that the offerings to the pujari in that case were made to the Goddess and that the lands endowed to the temple in that case were the property of the Goddess and not that of the pujari. But in that case the lands had been given to the temple by a poligar family. There was an inscription describing the dedication on the ceiling and the lands stood in the inam register in the name of the Goddess. The next case is *Srinivasacharyulu* v. *Pratyanga Rao*[4]. There the grant was expressly to the God and the family of the defendants were appointed as archakas. They claimed that the lands belonged to them subject only to the burden of service in the temple. It was held that the grant being clearly to the God, the usage according to the defendants could not be invoked in interpreting the grant. That has no application to a case where the grantor himself founded the temple and there is no written deed of grant. In such cases the only means of determining the nature of the grant is by the usage. In *Attorney-General* v. *Sidney Sussex College*[5] Lord Hatherley, L.C., says:

"I think the appellants are entitled to apply that principle of the Court which says, that if there be any ambiguity, the course of construction and

3. (1920) 40 M.L.J. 289.
4. (1920) 30 M.L.T. 101.
5. (1869) L.R. 4 Ch. A. 722 at 732.

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action upon the bequest may be called in aid, as inferring that the persons who are concerned in the trust have not been committing a breach of trust from the commencement downwards to the present time. The reason why the Court relies upon that rule with reference to charities, where there is anything doubtful in the construction of the will, is, that there have been persons alive who were competent to controvert any such conclusion, and it is not to be assumed that, where many persons were interested in controverting such a conclusion, a course of action has been adopted which has been a plain and clear breach of trust."

In *Attorney-General* v. *Bristol (Mayor of)*[6] Lord Chancellor Eldon remarks:

"The construction in these cases, I take it, must be considered to go upon intention, and the different rules furnished by the cases I have mentioned, are to be considered as indicia of the intention. Was it then the intention of the donor that *Bristol* should be a trustee. . . . . . As far as I have read these ancient cases, they state it to depend upon the intention of the donor, and that one way of finding out that intention is, to enquire, whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed amongst the objects of the charity?"

In *Attorney-General* v. *The Corporation of Rochester*[7] Lord Justice Turner says:

"Undoubtedly, if an instrument be doubtful in its terms, contemporaneous usage may be referred to; and if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument, the Court will lean to that construction of the instrument (provided it be doubtful) which will best correspond with the mode in which the funds have been for so long a period applied."

In *Attorney-General* v. *Skinners' Company*[8] Vice-Chancellor Sir L. Shadwell quotes Lord Holt to the following effect:

"I do agree there is no Statute of Limitation shall bar a charity; but in a thing that is obscure and dark, and there hath been an enjoyment for a long time, I think an enjoyment for a long time, without interruption, is a great evidence of a right; for quiet enjoyment for a long time does presume a rightful enjoyment."

Turning to the Indian cases, in *Abhiram Goswami* v. *Shyama Charan Nandi*[9], it was held that

"Though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that that land formed an endowment for the purpose, yet it was a fact that might well be taken into consideration, when, as in this case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language."

The rule, therefore, is quite clear that in the absence of a written grant or where the terms of the written grant are ambiguous or where there is no direct evidence of the terms, usage can be looked to to determine the nature of the grant.

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6. (1820) 2 Jac. & W. 294: 37 E.R. 640 at 649.
7. (1854) 5 De G.M. & G. 797: 43 E.R. 1079 at 1089.
8. (1833) 5 Sim. 596: 58 E.R. 463 at 470.
9. (1909) L.R. 36 I.A. 148: I.L.R. 36 C. 1003: 19 M.L.J. 530 (P.C.).

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As regards the second contention that such a grant as is contended for by the defendants in the present case is not a legal one, no authority has been quoted. Reliance is placed on certain remarks of Seshagiri Aiyar, J., to the following effect at page 915:

"It would undoubtedly be regarded as a fraud practised upon the public that the income derived with reference to the sanctity and holiness of a shrine should be regarded as the perquisites of the persons in charge,"

and

"It would strike at the very root of religion in India to hold that the person who is permitted by the worshippers to receive the offerings is the owner, and not simply the trustee, of the income."

These must be considered as *obiter dicta* and in *Puraviya Goundan* v. *Poonachi Goundan*[3] Oldfield, J., criticises them saying that on this basis

"it is difficult to see how the existence of any private temple at all can claim legal recognition."

There are many temples where the archakas after performing puja and maintaining the temple are entitled to the surplus. On the abstract question of law, we may quote Tudor on Charities, Chapter V, 4th edition, page 115:

"The surplus income, and the benefit of any subsequent increase, which the charities do not take, may be specifically disposed of either by the devisees being directed to retain it for their own benefit or by its being directed to be applied in other directions."

In *Rambrahma* v. *Kedar*[10] it was laid down that a charitable corporation, in so far as it is charitable, is the creature of the founder, and that the proof of intention of the founder of a religious institution becomes almost conclusive, where the usage is immemorial, though the intention may be presumed from a number of instances extending over a limited period; provided only that the existence of an invariable practice is made out by clear and unambiguous evidence; and that the Court will be slow to draw an inference which will defeat a right that has been exercised without question during a long period, and unless such inference is irresistible, the Court will presume everything that is reasonably possible to presume, in favour of such a right. In *Chinnatha Rowther* v. *Karunji Andi*[11] it was held that a member of a family of pujaris entitled to the surplus income of the suit properties belonging to a temple after meeting the puja and other expenses of the temple was entitled to maintain a suit to set aside certain alienations made by certain members of the family as not binding on the temple and to recover the properties on behalf of the trust.

3. (1920) 40 M.L.J. 289 at 299. 10. (1922) 36 C.L.J. 478.
11. (1926) M.W.N. 192.

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In the present case it is not denied that the temple had been maintained and greatly improved by the founder and the 1st defendant. These improvements were made at a cost of between Rs. 50,000 and Rs. 1,00,000. We are quite clear that there would have been nothing illegal in the founder of the temple having created a trust to the effect that the temple should be maintained out of the offerings to the idol and that the balance should go to himself and his family, provided this did not offend against the law of perpetuities or such other provisions with which we are not concerned. Their Lordships of the Privy Council say as quoted above:

"It may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immoveable property which he possessed before he died."

They do not appear to think that this would be any violation of the trust merely because the temple is found to be a public one. In fact, the scheme now provides in section 24:

"The pujari shall not ordinarily be paid any salary for his work and duties from temple funds but if after the temple liabilities are discharged in full, at the end of any year after audit it be found that there is a balance of income over expenditure, the pujari will be paid 50 per cent. of that balance amount as his honorarium for that year."

This, according to the contention of the learned Advocate for the appellants, would be an illegal breach of the trust as he contends that all the money belongs to the deity. It is difficult to see on his argument how the pujari could even maintain himself out of such gifts.

The origin of the temple has been recounted and we have to try and determine what was the intention of the original founder. Lakshmana Goundan was probably a very pious man, but the evidence is perfectly clear that he did not regard all the offerings made or money taken as the property of the deity. It has to be remembered that besides his position as a pujari, he was also considered as a seer. Their Lordships of the Privy Council say as quoted above:

"It may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immoveable property which he possessed before he died."

This is not merely an assumption but it is proved to the hilt by evidence. In Ex. II, a statement given by his son in 1859, the latter makes it clear that the property purchased by his father in 1835 and 1836 (Exs. XXII and XXII-*a*) were enjoyed and possessed by his father and himself, and there is

no mention at all of their belonging to the deity. As Mr. Justice Burn correctly stated, some lands which were originally personal inams were acquired by Lakshmana Goundan in his own name without any indication in the title-deeds that they were intended for the benefit of the temple. It is true that after his death at some date which is unknown, these properties were entered in the name of the God and they are now admitted to be temple properties; but there can be little doubt that this change was effected after the death of Lakshmana Goundan and probably by his widow during her son's minority. Mr. Justice Burn says:

"They are now entered in the public records as held on behalf of the temple by the pujaris. The history of the entries is not very clear."

Mr. Justice Oldfield says:

"The documents however available in each case Exs. XXII, XXII-*a*, XXI and LII for item 1, Exs. XV and XV-*a* for item 2 and XVIII and XVIII-*a* for item 6 contain no indication that the property was the deity's and not Lakshmana's own. In Ex. II a statement given to the Tahsildar in 1859, 1st defendant's father referred to item 1 without any suggestion that Sri Kandaswami had any interest in it or that it had been dedicated to the public, as an appanage of the temple; . . . . . The inference is that these items were personal inams acquired by Lakshmana by purchase and the same appears explicitly as regards item 1 from the documents above referred to."

It is not as if Lakshmana Goundan did not draw a distinction between lands which he bought for himself and those which he bought for the deity. From Ex. C it will be seen that he did purchase land specifically in the name of the deity. This appears to have been the land which he first got on mortgage under Exs. XV and XV-*a* and while it is correct as stated by Mr. Justice Oldfield that Exs. XV and XV-*a* contain no indication that the properties were mortgaged to the deity, it would appear from Ex. C that a cadjan sale-deed, dated 1847, which is not forthcoming, was executed to Pujari Lakshmana Goundan for Kalipatti Kandaswami deity. In the light of these facts it cannot for a moment be contended that Lakshmana Goundan was so unworldly that he dedicated to the deity all the offerings made and took nothing for himself. We are not prepared therefore to accept as completely correct the remark of Seshagiri Aiyar, J., which is *obiter* (1919 M.W.N. at page 905):

"Notwithstanding the high character of Lakshmana Goundan, it is abundantly clear that it was the deity which attracted the worshippers and that it was the deity for whom the offerings were made. . . . . therefore it is impossible to believe that offerings were made to Lakshmana Goundan personally and not to the idol."

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Again the remark (1919 M.W.N. at page 909):

"I do not think the fact that for a long time, the priest in charge was allowed uncontrolled possession of the income, is indication, at any rate in India, that the priest was the owner of the offerings."

It is clear from the facts stated that Lakshmana Goundan did not dedicate the properties bought under Exs. XXII and XXII-*a*, nor does it appear that when he took a mortgage of the lands under Exs. XV and XV-*a*, he took that mortgage for the deity though he seems afterwards to have dedicated these lands to the deity when they were sold to him.

As regards the attitude of the general public and the view they took of the offerings, the evidence is all one way. Until the final decision of the Privy Council that the temple was a public one, public officials and the villagers had regarded it as private. The Income-tax authorities had taxed the 1st defendant one year on the temple income. P.W. 18, who is a witness on inimical terms with the 1st defendant, states at page 90:

"Pujari spends the hundi collection. It is known to all. Knowing that pujari is spending it, we put money in the hundi."

No witness comes forward to say that he understood that all the money put into the hundi was the property of the God. Although admittedly the bulk of the money used to purchase the properties in dispute must have come out of the temple offerings, still it appears from the evidence of D.W. 10, that *abishekam* money went to the 1st defendant. He says 10 annas should be given for *abishekam*. Without that it will not be done. The witness was quoted to us as saying that neither *naivedyam* nor *abishekam* money was paid to the pujari, but as regards *abishekam* this does not appear to be correct. However, the matter is not really material, as this is not a case of mixing trust money with private money. For this reason, we think that the cases quoted to us with regard to mahants or matathipathis or of trustees who mix private money with trust money have no bearing on the present question and it is not necessary to refer to them. We see no reason to suppose that the trust was not one by which the founder maintained the idol and later on the temple and retained the surplus offerings. He not only founded the temple but admittedly he and his successors have greatly enriched and enlarged it. There is no question of breach of trust on this score. We see no reason to hold that the lands in dispute were bought from trust money or in breach of any trust.

That being so, it is not necessary to go into the second ground urged on behalf of the respondents that even if there

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was a breach of trust, it would amount to back-accounting to enforce restoration of these lands and that this should not be done where the breach of trust had been due to a *bona fide* mistake. In this connection, *The Attorney-General* v. *The Master, Wardens, etc.; of the Wax Chandlers Company*[12] and *Kelu Achan* v. *Sivarama Pattar Karikar*[13] are quoted, but we consider it unnecessary to discuss the point.

Turning to the scheme itself, the appellants did not ask for the removal of the 1st defendant. Whatever may be his character otherwise, he has done a great deal for the temple and the remarks passed about him in various judgments show that the institution will probably suffer if he is not retained. It is, however, argued that owing to his conduct since he has been appointed as receiver, two co-trustees should be added. We think on the whole that this would not conduce to the smooth administration of the temple and that paragraphs 14 and 21 of the scheme will operate as a sufficient check upon the conduct of the 1st defendant. Paragraph 25 which provides for the modification of the scheme must be deleted, as it has been held that such an order is *ultra vires*. In other respects, we see no reason to modify the scheme.

The memorandum of cross-objections as regards jewels is not pressed.

In the result the appeal is dismissed and the judgment and decree of the Lower Court with the modification noted above are confirmed. The Privy Council allowed the costs of the suit from the temple funds.

We think, in the circumstances, the costs of this appeal on both sides also should be met from the temple funds.

S. R. *Appeal dismissed.*

[END OF VOL. LIX.]

12. (1873) 6 H.L. 1 at 14 at 23. 13. (1927) 113 I.C. 635.

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